Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

APPENDICES - III

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85 pp

APPENDIX: Volume III

Appendices X ~ B-B; pp. 152 a ~ 235 a

APPENDIX X: Answer to PBS "Amici"

Statement of The Case ---------- 152 a

APPENDIX Y: Response to FCC Amicus

Statement of The Issues ---------- 168 a

APPENDIX Z: Petition For Rehearing En Banc

This is a Civil Rights Case ---------- 196 a

APPENDIX Z-1: Affidavit of Facts

re KHOG/KHBS, ---------- 210 a

APPENDIX Z-2: Affidavit of Facts

re AETNState Defendants, ---------- 214 a

APPENDIX A-A:

Petition To Recall Mandate, ---------- 217 a

APPENDIX B-B

The True Rule of Reason, ---------- 222 a

Free Speech is Too Vital to be Restrained by *Private* Censorship ---------- 226 a, 227 a and *passim*

The Constitution: Our National Enactment ---- 234 a

APPENDIX X

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, ET AL.,
APPELLEES.

BRIEF IN ANSWER TO AND IN OPPOSITION TO "PBS' " "AMICI" BRIEF

> **"Yes, we did produce a near perfect Republic. *But will they keep it,* or will they, in the enjoyment of plenty, *lose the memory of freedom?*"**
> **Thomas Jefferson**

***

STATEMENT OF THE CASE

This is NOT a case where a claim is made for a right to "appear on television."

This is a case to preserve the inalienable, inherent rights protected by the First Amendment for the Plaintiff, the People of Arkansas, and the People of the United States and our Posterity.

This Cause seeks to restore and preserve the fundamental prerequisites of a constitutional Republic of Law, of government of, by and for the people. All of the cardinal, underlying foundations of a self governing, free people are at stake here, with particular focus is upon Article III, the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

PRELIMINARY STATEMENT

If allowed to stand the decision of the District Court will effectually repeal the First and Fourteenth Amendments and establish the aristocracy of the Fourth Estate as an extra-unconstitutional branch of government, an all-powerful, super-"legal" Orwellian Ministry of Truth by "legalizing" the powers of state officials and powerful special interests to control and censor practically all the information to which the American People will have access.

Ultimately, this will lead to an Orwellian totalitarian tyranny and destroy the Nation and the Constitution which this honorable Court is bound to protect and preserve.

A decision abrogating the basic rights claimed by Plaintiff would have a profound impact on the nation's right to self government by a free and informed electorate.

The (defendants) ... and ... *government entities* must be enjoined from usurping absolute power as a veritable *Ministry of Truth* "to include or exclude spokespersons or viewpoints." This Court must make it clear that the Law, the First Amendment, the Fifth Amendment, the Fourteenth Amendment and 47 USC § 312 and 315 *as written and intended by Congress,* et seq., apply, so they have no "right" to censor viewpoints and expression, but conversely *They Do Have A Constitutional And Statutory Duty To Afford Equal Opportunities To Candidates And Viewpoints, Even Those They Oppose.*

If the defendants would obey the law and cease violating the most essential rights secured by the Constitution and laws, there would be no need for "legal challenge and judicial intervention," such as this.

Enforcing the Constitution is *not* "judicial intrusion."

But, giving the defendants *carte blanch* to censor opinions and viewpoints and to unlawfully discriminate against persons and classes in the name of "editorial decisions" would be repugnant to the First Amendment.

"Legalizing" censorship by calling it "discretion" or any other name is also inconsistent with reason and the statutory scheme of the Communications Act which requires the licensee to provide programming "which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence, and which will constitute a source of alternative [programming] . . . ." 47 U.S.C. § 396(a)(5).

Censorship. The denial of the right of "freedom of the press" and the right of "freedom of speech," *and all of those rights which are had under a free government.*

Esquire, Inc. v. Walker, D.C.D.C., 55 F.Supp. 1015, 1020

In section of Federal Communications Act providing that licensee shall have no power of censorship over material broadcast by legally qualified candidates for public office, the word "censorship" connotes *any* examination of thought or expression in order to to prevent publication of objectionable material.

Farmers Ed. and Coop. Union of America, N.D. Division v. WDAY, Inc., N.D., 79 S.Ct. 1302,1304, 360 U.S. 525, 3 L.Ed.2d 1407

"Censorship consists of present governmental interference with or suppression of expression and is a regulatory, proscriptive or compulsory exercise of governmental power.

Keene v. Meese, D.C.Cal., F.Supp. 1111,1118

The "amici" claim that ... defendants are merely "editing" under regulatory powers is preposterous. Editing is selection and choice of material, and may or may not include, or be misused as a pretext for censorship. *But Exclusion Of Candidates And Viewpoints Is Censorship.* It is not "editing." And to hypocritically pretend bald, *prima facie* censorship is "editing" or "content regulation," *ad absurdus,* is brazen casuistry.

The purport that debates set up, sponsored, controlled and censored by broadcast stations is "news," [to contrive] a loop hole big enough to drive a nation of sheep through, is not only preposterous on its face, but is an unethical deceit that fails on grounds of inconsistency. *The Code of Ethics or Can-*

nons of Professional Journalism and *The Television Code of the National Association of Broadcasters* condemn manufactured or contrived "news" in which the news organization initiates or sponsors the "news" as unethical *non-news.*

Thus, for a broadcaster to set up and sponsor a debate and call it a *bona fide* "news event" is patently a fraud and a hoax by the standards defining news adhered to by the "amici" and the defendants.

* * *

... The censorship, exclusion, denial of rights, and unequal protections of the law were blatantly "an effort to suppress expression merely because (defendants) oppose the (petitioner's) views."

"... *The Right Of The People ... To Petition The Government For A Redress Of Grievances,*" May Not Be Abridged.

It is axiomatic that Citizens and Natural Persons are entitled to have a Remedy at Law. *The Judicial Power is reposited in the Courts,* not the FCC. Nor may such powers and duties be constitutionally transferred, nor nullified. The Bill of Rights and the Law of the Land guarantees Citizens and Natural Persons access to the Courts and Common Law Rights.

The government may NOT abridge the Right to Petition our Government for redress of grievances. An action at law is certainly one form of Petition; but a forced march down the proverbial garden path with *Alice Through the Looking Glass* into the never-never wonder land of Washington bureaucracy where "The Rule Is, Jam Tomorrow, And Jam Yesterday - ***But Never Jam Today!***" is no adequate remedy under law, nor a satisfactory substitute for the right to one's day in court where the Constitution is recognized as the supreme written Law of the Land and where equal justice for all without regard to person, class, wealth, power or creed is respected.

It is repugnant to the Constitution for any congressional, judicial and/or bureaucratic scheme to infringe upon constitutionally guaranteed rights, and/or to put these rights at the mercy of some bureaucracy. Licensed broadcasters, privileged

and powerful entities, such as the defendants and their "amici" cohorts are under the jurisdiction of the Federal Communications Commission *to curtail them from abusing the powers granted them by the people, such as they have done in the instant case.* It is irrational to claim that the rights of the people, and of the plaintiff, must be surrendered to a regulatory agency *so that the regulated licensee can violate the Constitution and laws with brazen impunity.* The Supreme and Constitutional Courts have exclusive jurisdiction to enforce the Constitution and defend rights.

* * *

Failure to reverse the District Court's decision would deeply entrench the powers of censorship that are lethal to our constitutional form of popular government. A judicial mandate that gives any broadcaster ... the power to dictate the parameters of speech and information and to usurp the powers and rights inalienably retained by the people would be subversive and odious to the First Amendment and the Liberty of the People.

To "legally" enmesh the (defendants' "good faith") "editorial decisions" as a surrogate for the people's free and independent thought is offensive and abhorrent to the Constitution. Judging issues and candidates is the innate prerogative of the People and it may not be usurped by the "amici"s' self-styled "Ministry of Truth."

The First Amendment does not countenance, much less require, such "editorial" interference in the unabridgeable rights of free expression.

* * *

The "amici" state: "In exercising their editorial discretion (defendants) will unavoidably make programming decisions which can be characterized as 'politically motivated.' " *Then on the face of it, "editorial discretion" is violative of the Constitution,* and this court must enjoin defendants and "amici" from using (the rubric of "good faith") "editorial discretion" as a facade for *politically motivated censorship.*

The best and only constitutional way to free "virtually every programming decision subject to judicial challenge" is to make it clear that only the broadest, least restrictive criteria meet the constitutional and statutory requirements that are "responsive to the needs, problems and interests of the residents of the area they serve. . . ."

A general license "legalizing" licensee's censorship as "political programming decisions" would clearly be contrary to the Constitution and would render the First Amendment obsolete and nugatory.

(Defendant's) euphemistic ("good faith" censorship) ... constitutes precisely the sort of (editorial censorship) ... decision" that is forbidden by the First, Fifth and Fourteenth Amendments and 42 USC 1983, 1985, 47 USC 312, 315, et seq.

It is no different than a decision, for example, to declare that "war is peace," "black is white," "We have always been at war with Oceania, and we have always ...!"

Or, "**CENSORSHIP IS *FREE SPEECH!***"

(The pretext of "good faith determination"). . . is unadulterated NewSpeak for the ugly words, *censorship, discrimination, suppression and thought control.* A broadcaster's claim to a "right" to (censor) view points goes to the very heart of the abominable attack against the First Amendment.

* * *

. . . When the defendants and "amici" usurp the roles of censors and politically correct thought police it is the duty of the court to enforce the clear constitutional mandate.

* * *

. . . Appellant respectfully points out that the (defendant's) intent to defend the indefensible demonstrates the truth that the ... censorship of appellant's speech and denial of equal protections of the laws by the defendants was not a mere one time aberration by misguided individuals, but is in fact a pervasive pattern, the general design of a self-anointed class of "politically correct" commissars to usurp an unconstitutional monopoly with the power to control what the people, the electorate, shall be permitted and/or denied the right to hear.

The pretext of "editorial decisions" claimed by the ... Defendants and their erstwhile "Amici" allies is a brazen Orwellian euphemism for censorship. Inherent in this power of censorship is the power to unlawfully discriminate, to hide animus and hostility under the sham and cloak of "editorial responsibility." The purpose of the Defendants and their "Amici" accessories is to unconscionably enmesh the courts into "legalizing" their de facto conspiracy to deprive the appellant, the People of Arkansas, and ultimately all the People of the United States of all of their rights by unconstitutionally controlling and censoring all meaningful expression under color of the facade of "legality," hiding behind the pretense of "editorial decisions."

* * *

"... The More Imperative Is Our Need To Preserve Inviolate The Constitutional Rights Of Free Speech, Free Press And Free Assembly *In Order To Maintain The Opportunity For Free Political Discussion, To The End That Government May Be Responsive To The Will Of The People* And That Changes If Desired, May Be Obtained By Peaceful Means. Therein Lies The Security Of The Republic, The Very Foundation Of Constitutional Government."

Justice Charles Evans HUGHES,
DeJonge v. Oregon, 299 U.S. 353, 365 (1937)

When this Nation was founded it was mocked by the entire world. At best, it was called a "noble experiment," doomed to failure. Yet, none of the "eternal" empires and absolute, mighty monarchies of those days have survived, while our constitutional republic has endured two centuries of trials and is the inspiration for all who dream of Liberty and Justice. Our People, our history, the courage and wisdom of the great minds that have presided over judicial system have proven: A government such as ours can never fail so long as the people believe in the security of Absolute Law, Natural Law of Rights and Duties guarded by those who have dedicated themselves to upholding righteousness and justice.

But, a government of law, such as our heritage, can never survive as rule by men, caprice, whim and arbitrary

decisions on the winds of the "political correctness" *de jour,* or as the lackey and tool of the privileged and the powerful. Our nation stands so long as the great fundamental, essential principles are preserved in granite;

But we will fall if ever we succumb to tolerating constitutional vandals, like *Animal Farm* pigs, to desecrate and transmute our Law with "amici" spray paint and obscene Orwellian graffiti:

THE SIX COMMANDMENTS OF NEW ORWELLAND

1. "All are equal, *but some are more equal than others.*"

2. Free speech means *the power to censor.*"

3. Censorship is "legal" as long as those who are "more equal" than others mask it under politically correct Orwellian NewSpeak such as "journalistic decisions essential to discharging their obligations as licensees under the Communications Act."

4. Commercial corporations and powerful special interests shall also have power under the first amendment to decide what the people shall or shall not be allowed to hear.

5. But, Natural Persons and ordinary Citizens shall not be allowed to interfere with the First Amendment powers of the State and/or the privileged state licensees.

* * *

Our Nation was founded upon the bedrock of the Bill of Rights, *not the vagaries of Orwellian slogans and deceptions.* We long prospered under the proposition that we had a legal, moral and political standard *based on absolute immutable Law that transcended man.*

President Jefferson, the author of our Declaration of Independence admonished us *to escape tyranny, men must be bound by the chains of The Constitution.*

Jefferson and so many great and wise have also forewarned us:

THE PRICE OF LIBERTY IS ETERNAL VIGILANCE.

Even "fourscore and seven years" after "our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Honoring the fallen at Gettysburg, President Lincoln articulated the fateful question that is germane today: "whether that nation or any nation so conceived and so dedicated can long endure." Our country survived that terrible tragedy and was reborn as a Nation. Since that time many more have sacrificed the last full measure of devotion to preserve our liberties. Today, in this Court room, in this case, we are met on a great battlefield, a contest for the heart, soul and future of America, that may well decide the answer to this question. Let us, who follow after righteousness, hearken to the words of Isaiah, the prophet, and look unto the constitutional bedrock from which our nation is hewn, and to the spiritual springs from which we are sprung {Isa. Ch. 51}, so "that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people and for the people shall not perish from this earth."*

If The Foundations Be Destroyed, *What Can The Righteous Do?* Psalm 11:3

The Judicial Power is delegated to the Court by the People and is expressly, explicitly and implicitly by consent of the governed by virtue of the constitutional covenant. This compact binds all governmental officers and public servants including the FCC and the judiciary. This Constitution is the supreme Law of the Land. All judicial Officers are bound by

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* * *

* "We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all our political institutions ... upon the capacity of each and all of us to to govern ourselves, to control ourselves, to sustain ourselves, *according to the Ten Commandments of God.*" James Madison

"We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge or galliantry would break the strongest cords of our Constitution as a whale goes through a net. *Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.*" John Adams, **Works of John Adams, 2nd President of the United States**, collected by Charles Francis Adams, 1854.

Oath or Affirmation to support this Constitution. If ever this supreme contract is broken then the court system, itself, would be without lawful or moral authority; and the nation would stand on voracious quicksand.

Court precedents do not and should not supplant the Constitution. What the Constitution *says,* and not what commentators say about it, is decisive. To err is human, and even the greatest of justices and courts err. That is understandable; but it is intolerable when errors are given quasi-infallible status, so that every subsequent decision based upon them becomes compounded error, creating a legalistic Frankenstein monster that devours the true letter and spirit of the Constitution. The courts were designed to be the people's shield, in Hamilton's words, "the bulwarks of a limited constitution against (tyrannical) encroachments." But, the original "sin" of infringing upon the First Amendment in favor of the powerful media, where two wrongs make a right, and each successive wrong only makes it "righter," has made abridgment routine.

"Legal" is not necessarily synonymous with Lawful. ***Power is almost always in conflict with authority.*** There is no question those who been licensed to broadcast over the public's airwaves have been granted vast powers, and they have demonstrated they have the power to suppress (and or publish any thing they choose), the Constitution and the Law not withstanding; *but they do not have the right nor the Lawful authority to act as "Big Brother" and control thought and expression in what is supposed to be a free and open society.*

A bureaucracy, or any branch of government, legislative, executive or judicial, may, out of fear of the media, and/or in unholy league to usurp absolute political power, "legalize" the defendants' and "amici"s' claimed "rights" to censor, suppress, control and "legitimize" speech, thought, beliefs, views, expressions and opinions, *but all of the "legalizations" from here to* Marbury v. Madison *will never make such censorship and unlawful discrimination lawful, constitutional or right!*

An airplane in flight, or a ship at sea, is almost always off course; but it arrives at its destination by virtue of constant correction. When it veers left, it compensates by moving right.

But if the captain or navigator was stubbornly guided by an error, and compounded that miscalculation with error upon error, soon all bearings would be lost, and disaster inevitably result; unless there is a fundamental correction of these errors.

If one of the members designed to stabilize the craft in flight were lost, immediate corrective action must happen to save the craft and all on board. If a shift is made in the direction of the imbalance the aircraft is in danger of falling into an inextricable tail spin. *The FCC shot away the Fairness Doctrine regulator, and free speech in the controlled airwaves is plummeting to destruction.* This Court must recognize this fundamental shift in the "carefully crafted" regulatory scheme, and restore control to the First Amendment.

Distortion upon contortion of the concept of free speech and equal rights has led the nation and law so far astray that the siren songs of totalitarian tyranny sound like motifs of freedom. This Court, in this case, has the opportunity and the sacred duty to correct the constitutional course and save the nation from catastrophe on the shoals of slavery and tyranny.

"Amici" and defendants can't stand the plain and clear commands of the Constitution, so they have no prospect to prevail except by the conundrum of obfuscation, complexity and confusion.

"Too much light often blinds gentlemen of this sort. **They cannot see the forest *for the trees.*"**
Musarion [1768], *canto II,* Christopher Martin Wieland

In *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506,507, 65 L.Ed 963 (1921), Justice HOLMES tersely observed that "a page of history is worth a volume of logic."

From this it follows that a brief overview of history will help bring all of the many claims and voluminous citations before the Court into proper perspective and focus.

"Yes, we did produce a near perfect Republic. But will they keep it, or will they, in the enjoyment of plenty, lose the memory of freedom?" Thomas Jefferson

The Decline and Fall of The Great Republic: *Is It Inevitable?*

Let us look at the history of a mighty nation, the Great Republic. The pilgrims that started the nation were searching for religious freedom and personal liberty. When the pilgrims arrived at their new land, it was occupied by uncivilized tribes. After a long and hazardous journey they found refuge near a large rock and thanked their God for their safe journey and pledged their devotion. They later enshrined the rock that they stepped upon, and this rock became a world-renowned monument, and after many years is yet one of their new country's great landmarks. The pilgrims, who were rigidly stern, had a great faith in their god and after they made a settlement in the new land, they proclaimed a Thanksgiving Day.

Religious schools were then established, which became the world's first free public education. The colony grew and expanded, but the rest of the world looked at this effort as a joke.

As time went on, great prosperity came to this new land. Punishment was severe for law breakers and those who would not work could not eat. More colonists came to this new land and established more settlements, and the noble words such as "liberty," "equality" and "freedom of religion" rang throughout the land. Soon the old world, from whence the pilgrims came, began to levy high taxes on the colonists and they retaliated by gathering an army and choosing a gentleman farmer to be its general. A famous American city is named after this same general. After winning complete independence, a new government was formed, which was made up of two houses, the most powerful one being called the Senate. The new nation was a republic, *but did not stay a republic for long.* A great civil war broke out and the leader who tried to keep the nation united was assassinated in the capital city. It was not long until power-hungry senators began to represent private business interests instead of the people. The republic began to get involved in foreign affairs which led to wars. The wars brought ever increasing taxes, but because the wars also created jobs, people tolerated the almost imperceptible decline. Taxes were introduced to "tax the rich," but soon the middle class began to bear the tax burden. Farmers began to rise up and demand that the government subsidize them and

give them price supports. The government bought surplus crops and put them in storage until they rotted. Soon many businesses began to ask for special tax benefits and subsidies. The central government became so powerful that people began to worship it as deity with a spirit of patriotism. Soon massive mounts of people began to live off the government on welfare and began to bask in the free services. This created such a heavy tax burden on the middle class that it soon was swallowed up and joined the ranks of the welfare recipients. Next came a great war which the nation was led into by a crippled man. A famous general who fought in this war was criticized by his own government, and when he called this nation to return to original honor and values, he was mocked and scoffed at. Then one senator rose up and spoke out against foreign aid which was draining the people's money, but the public called him a radical and rejected him. *Soon liberty and freedom of speech were reduced to cynical mockeries, and the unchallenged lies of scoundrels decided the destiny of the once-upon-a-time Republic.* The nation went into the depths of debt. Crime became so common that the streets were unsafe. Taxes still increased all the more, and wheat was sent to enemies. The currency was devalued, and precious metals for coins were substituted with base metals. The nation then sent experts and advisors to train other nations in the latest techniques of war. By this time the nation was totally corrupt, the economy was destroyed, the middle class disappeared and civilization was lost for centuries of dark ages.

The name of the nation described by all of the above is *Ancient Rome!* The pilgrim rock was the foundation stone of the Temple of Jupiter. The farmer and general was Cincinnatus; Cincinnati, Ohio is named after him. Julius Caesar was the assassinated leader that tried to hold the nation together. The crippled leader was Caligula. Mark Antony was the general who called for the return to original values, and Cicero was the senator who opposed foreign aid.

"There is nothing new under the sun." Ecclesiastes. 1:9

Adapted from *Honoria* by Taylor Caldwell
cf., Once There Was A Great Nation, by Gary M. Rekstad,
New York, NY; "*The Modern Romans: The Decline of Western Civilization*" [1971 ed.]; *et seq.*

IS OUR REPUBLIC DOOMED TO SUFFER THE SAME FATE, *OR CAN WE LEARN FROM HISTORY?*

The pernicious symptoms attributed to aging are not foregone. It is possible to gain wisdom and maturity while rejuvenating and reinvigorating the body politic, just as it is for the individual who is willing to embrace the challenges and opportunities of life. The remedy to restore our Republic to the vigour and joy of its youth may be found in the wisdom of its founders:

"Equal and exact justice to all men, of whatever state or persuasion, religious or political ... Freedom of religion; freedom of the press, and freedom of person under the protection of the *habeas corpus,* and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error or alarm, *let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety.*"

Thomas Jefferson, *First Inaugural Address,* March 4, 1801

"The forms of your democratic government might for a time have remained, but its living spirit would have departed from it... But you must remember my fellow citizens, that *eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing.*"

President Andrew Jackson's Final Message, March 4, 1837
Compilation of The Messages and Papers of the Presidents, by James D. Richardson, a Representative from the State of Tennessee, published by the authority of Congress, 1900. Vol. 4, Page 1523.

Wherefore, for all of the above, and for the further reasons enumerated in Appellant's separate Briefs in support thereof, the "Amici" claims should not be considered by this honorable Court;

But if considered properly, the "Amici" presentments actually prove the Plaintiffs case.

Plaintiff prays the Court's indulgence for any mistakes in the foregoing in that it had to be prepared in the final hours of the week end of August 28th and 29th while preparing for the trip to St. Louis. Plaintiff also apologizes for the length, but he points out researching and typing is more effort than reading; and that it was the "amici" brief that compelled this rebuttal.

Moreover, there were other candidates whose rights and views were transgressed in what appears to have been an interstate conspiracy to suppress their common views by broadcasters. There are many Christian, Pro-Life and conservative organizations and churches who have at least as much as stake as the "amici" parties in protecting their rights and views from oppression and discrimination. They have had no opportunity to be heard. And, it would not be fair to them if their only defender was a common, ordinary Citizen of Arkansas against powerful, entrenched special interests represented by formidable law firms that are specialists in communication regulations, etc.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person
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CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I received a copy of the Court's Order granting leave to the "Amici" applicants on Friday, August 27th, 1993, and that I will deliver copies to the following Defendants, interested persons and/or their attorneys whom I believe will be present for the Hearing set for August 31st in the above styled matter; if they or their representatives are not present I shall mail copies to them at the following addresses:

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s/Ralph P. Forbes

RALPH P. FORBES

APPENDIX Y

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, ET AL.,
APPELLEES.

PLAINTIFF'S RESPONSE AND OPPOSITION TO "BRIEF AMICUS CURIAE FOR FEDERAL COMMUNICATIONS COMMISSION"

Proclaim Liberty Throughout All The Land
Unto All The Inhabitants Thereof.
Leviticus 25:10

* * *

STATEMENT OF ISSUES PRESENTED

1. Whether, the American People still enjoy a Constitution that governs the government *rather than a state that rules the people?*

2. Whether laws must be made, applied and enforced pursuant to the Constitution, or whether the Constitution may be twisted and tortured to comply with vagariesand whims of unelected state agents and privileged state licensees?

3. Whether the Constitution is supreme, and laws made pursuant to the Constitution by elected representatives of the people are superior to bureaucratic regulations and convolut-

ed interpretations of such rules by unelected public servants; or the converse is true?

4. Whether the Judicial power, delegated by the people in Articles III and VI to the Courts of Law to decide constitutional cases yet resides in the Courts; or whether the FCC has usurped jurisdiction from the courts and the people?

5. Whether *any* venue, including a publicly broadcast debate, staged, organized and financed by the state, between qualified candidates; [or] a private commercial enterprise, engaged in interstate commerce and licensed and regulated by the state must first be designated a "public forum" before due process and equality before the law apply?

The *Proper* Interest of
The Federal Communications Commission

The Federal Communications Commission is the agency *charged with regulating the broadcast industry* under the Communications Act of 1934, 47 U.S.C. 151, et seq. The FCC has no lawful authority over the people, nor any power or jurisdiction to abridge or infringe against the inalienable and equal rights of Plaintiff Forbes in particular.

The FCC is *mandated* to enforce 47 USC 312 and 315 by compelling *licensed* broadcasters to obey the law and enforce the law equally.

The FCC's *primary* purpose and duty is to protect the paramount rights of the people. The FCC should do this within "the statutory scheme enacted by Congress in the Communications Act to ensure uniformity in regulation of broadcasting." The FCC has, itself, threatened and sabotaged that scheme at least since *Chisholm* by reversing its own rules; *de facto* overturning the statutes it is charged with enforcing and even repealing the Bill of Rights and the 14th Amendment by unreasonable and capricious "interpretations," unequal enforcements; and destroying the "carefully crafted" scheme by revoking the Fairness Doctrine after vowing to the Supreme Court that this important element was almost "sacred."

Whenever, as in this case, the FCC claims jurisdiction and authority over the paramount rights of the people and the indefeasible constitutionally protected rights of citizens, then that claim raises issues clearly within the jurisdiction and authority of the Courts; when the FCC ignores the most serious complaints to it by the plaintiff against licensees, but has the time and resources to expend the taxpayer's monies to *de facto* defend the licensed defendants it is charged with regulating, the FCC demonstrates each and every charge of abuse and usurpation in Plaintiff's **Supplementary Digest**.

* * *

Plaintiff's attempts for even partial redress were exhausted with the KHOG Defendants, also, before plaintiff was forced by defendants to lodge this Action as the only adequate remedy at law.

On Monday, November 2nd, the last day before the elections as the amended Complaint was being served on the KHBS TV affiliates Plaintiff Forbes offered that he was more interested in protecting his and the people's rights than in fighting court battles, and that if KHBS would run his censored ads and give grant him an equal opportunity to present his views to the voters, even though it was probably too late to make any difference, he would drop his complaint against these defendants. This last minute offer for partial redress and reconciliation was met with the sneering reply that "all's fair in love and war," implying and admitting that defendants were at war with Plaintiff, his views and his constituency and that they were free to do anything they wanted to injure him, his views and his rights including censoring his ads, unlawfully excluding him from licensee staged debates and suppressing or misrepresenting plaintiff and his views in any way they chose.

The KHOG/KHBS, ABC Defendants unlawful censoring of Plaintiff's ads was based, not on the knowingly false pretext of "indecency," *but on hostility and animosity against plaintiff and his views; and because the defendants deemed the ads to be too effective, and unanswerable because they were true.*

The District Court wrongfully dismissed the complaint for each and all of the reasons before this Court. That court erred

in presupposing, among other things, that plaintiff was claiming "a First Amendment right to participate in a televised debate;" when in fact, plaintiff was seeking, among other rights, basic, plain and clear equal enforcement of the laws.

The due process clause of the Fifth Amendment guarantees to each citizen the equal protection of the laws and prohibits the denial thereof by *any* Federal official.

Bolling v. Sharpe, 327 U.S. 497

... so as to practically make unjust and illegal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356

* * *

REBUTTAL TO FCC'S "ARGUMENT"

I. THE FCC's CLAIM THAT "DISTRICT COURT LACKED JURISDICTION OF FORBES' COMMUNICATIONS ACT CLAIMS" IS HOLLOW

This Court has the right, the power and the duty to adjudicate the subject matter in this case. All three essentials (cognizance, parties, issue) are here in this case.

Reynolds v. Stockton, 140 U.S. 254, 268

This Court clearly has cognizance of this class of cases.

United States v. Guest, 383 U.S. 745, 782-784, 86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239

Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956)

Brown v. United States, 486 F.2d 658, 661 (8th Cir. 1973).

DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990)

Gutensohn v. Kansas City Southern Ry.Co., 140 F.2d 950, 933 (8th Cir. 1944)

Means v. Wilson, 522 F.2d 833 (8th Cir. 1975)

The proper parties are present. The points to be decided are well within the substance and effect of the issues.

Mugler v. Kansas, 123 U.S. 623, 661
Boyd v. United States, 116 U.S. 616 (1886)
Administrative Procedure Act, 5 USC 553, 706(2)(a)

In particular, the courts should not "'defer' to the judgment of the ... Commission on a constitutional question, or ... hesitate to invoke the Constitution ..."
Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2087; 412 U.S. at 103
Bell v. Hood, 327 U.S. 678 at 684, 66 S.Ct. 773 at 777, 90 L.Ed. 939 (1946)
Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2002,2004, 403 U.S. 388 (1971)
Action v. Gannon, 450 F.2d at 1238 (8th Cir. 1971)
See also, *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36, 53 S.Ct. 454, 457, 77 L.Ed. 1011 (1933) (CARDOZO, J.); *The Western Maid*, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299 (1922) (HOLMES, J.)

The FCC claims the district court lacked jurisdiction because, "[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *Yet, there was no "final order," nor any "order" from the FCC to "evade."*

After the FCC tried to discourage Plaintiff Forbes from claiming his rights for equal opportunity from AETN, Forbes asked the agency to issue a "final order" forthwith, instead of waiting until after the election to deny his demand for enforcement of *47 USC 315* and *47 USC 396* (f)(3), et seq. Only after both FCC and AETN failed to respond to plaintiff's demands for protection of rights did he file a complaint at law in the U.S. District Court at the last possible moment.

By their circumlocution the FCC seeks to bypass both the Constitution and the Courts in order to protect its usurped "turf" and its privileged clients that is charged with regulating.

After going around the bushes with cases more properly under commercial, admiralty, maritime or international jurisdiction in a footnote at 3 the FCC admits:

"None of these specific actions is at issue in this case."

The extent that plaintiff Forbes' claims are based on, or came within, the Communications Act is solely for the FCC enforcement of *47 USC 312 and 315*, et seq., *as applied to licensees*. When both the FCC and the licensees arrogantly, and with hostility, refused to obey the Constitution and the laws of the land, the District Court clearly has jurisdiction to enforce the Constitution and the laws of the land. And the citizen or natural person has a right to his day in court and to enjoy equal protections of the law without regard to person, power, wealth or creed.

* * *

[42 USC 1985(3)] was passed to enforce Amendment 14 to the U.S. Constitution and to protect from interference the rights secured thereby, as well as other constitutional rights; it is directed against conspiracies of private persons; and there is no requirement that conspiracy be under color of law.

Mullarkey v. Borgium, DC NY, 1970, 323 F.Supp. 1218

THE FCC AND ITS AGENTS ARE "PERSONS" WITHIN THE PURVIEW OF CIVIL RIGHTS ACT

* * *

Liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which *42 USC § 1983* was enacted. *Imbler v. Pachtman*, [96 S.Ct. 984, 412 U.S. 409, 47 L.Ed.2d 128 (1976)]

Government immunity violates the common law maxim that everyone shall have a remedy done to his person or property. Immunity fosters neglect and breeds irresponsibility while liability promotes care and caution, which caution and care is owed by the government to its people.

Plaintiff and the people of Arkansas were grievously and irreparably injured by defendants claiming to act under color of FCC sanction, *regulation*, custom or usage.

Moreover, there is strong evidence that the FCC, or some person or persons in authority, actively conspired with the Defendants in this case to unlawfully harm the campaigns

and suppress the expression of views of not only the Plaintiff but all Pro-Life candidates in the 1992 elections.

e.g., Plaintiffs First Amended *Complaint,* ¶¶ 25 ~ 31; 35; @ 5 & 6; and Plaintiff's Attachment, marked as #18, an article from the *Arkansas Democrat-Gazette,* November 1, 1992, p.4-A.

The FCC has at all times in this matter acted in a hostile manner to the paramount rights of the people and plaintiff in particular. The FCC "amicus" brief is *de facto,* if not *de jure,* the weight and power of the federal government joining the defendants' resistance to plaintiff's appeal for justice. At all times the defendants have attempted to use FCC "interpretations" and mock "due process procedures" to provide them "color of law" to deprive the people and the plaintiff of their most precious and fundamental absolute rights.

If even judges are not immune from criminal sanctions under the Civil Rights Act {*ex parte Virginia,* (1879) 100 U.S. 339; *Pierson v. Ray,* (1967) 386 U.S. 547; *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.,* 91 S.Ct. 1999, 403 U.S. 388 (1971); *Duke v. State of Texas,* DC Tex, 1971, 327 F.Supp. 1218; *Yates v. Hoffman Estates,* (1962, DC Ill) 209 F.Supp. 757; *Bramlett v. Peterson,* (1969, DC Fla) 307 F.Supp. 1049; *Westberry v. Fisher,* (DC Me, 1971) 309 F.Supp. 95};

And that Congress intended to do away with whatever common law immunities existed {*Congressional Globe,* 42nd Cong., 1st Session, 365~8; 385 (1871)]; and if FCC regulations are "law" and the FCC is a "law enforcement agency," then *28 USC 2680(h)* allowing individuals to sue the federal government for injuries or damages caused by unauthorized acts or omissions may be applicable as well as *42 USC 1983*:

"So in deciding what congress meant when it referred to 'every person' in *42 USC 1983,* it is significant that congress had earlier rejected specifically judicial immunity by passing the Civil Rights Act of 1986"

Littleton v. Berbler, 468 F.2d 389 (1972)}

And, since this section provides civil action for deprivation of rights or invasion of constitutionally protected rights by "persons acting under state *or federal* authority."

Weise v. Reisner, (DC Wis, 1970) 318 F.Supp. 580

Therefore, from all of the above it appears the Court should *sua sponte* move to change the status of the FCC from that of "amicus" to defendant in this matter.

On page 4 of its Brief the FCC claims that even when there is no FCC order to appeal from *the Circuit Court has original, exclusive jurisdiction.* If that is true, we are here before this Court. It would be futile, and in error if the FCC's assertion is correct, to remand to district court. *This Court has the authority and the duty to fashion a remedy based on Law and Justice.*

Mugler v. Kansas, 123 U.S. 623
United States v. Guest, 383 U.S. 745, 782-784, 86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239
Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)
Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971)
Scott v. Moore, 640 F.2d 708 (1981) at 725

* * *

The FCC admits it "routinely deals with disputes between candidates and broadcasters concerning such matters." If the law was enforced constitutionally as clearly written and intended, there would be no "routine disputes."

Neither Plaintiff, nor anyone is required to do what is unreasonable and futile. The "procedural" red tape, mere useless, fruitless exercises in futility, with a *guaranteed denial* of rights *after* the election was over is not an "administrative remedy" as the fact finders found in *Muir*. Plaintiff vigorously claimed and asserted his rights with the defendants and the FCC at all times and that is sufficient.

Sporehase v. Nebraska, 458 U.S. 941, 944 n.2, 102 S.Ct. 23456 (1982)
Election Bd. v. SWParty, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)
Nyquist v. Manclet, 432 U.S. 1, 97 S.Ct. 2120 (1977)
Jackson v. Ogilvie, 325 F.Supp. 864 (ND Ill) aff'd 403 U.S. 925 (1971)
Stevenson v. State Board of Elections, 638 F.Supp. 547, 794 F.2d 1196, USDC for ND of Ill ED, (1986)
Anderson v. Hooper, 498 F.Supp. 898 (DNM 1980)

The FCC approved the footage that Plaintiff Forbes used in his ads, but rather than regulating the offending licensee that censored the FCC-approved ads, the FCC is expending taxpayers' (money) to aid the defendant licensees who violated the Constitution, the laws and the FCC's own rulings.

* * *

"If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the People, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence may justify. The propriety of law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which indeed, cannot easily be imagined), the federal (communications agency conspired with licensees to suppress free thought and speech) would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon (the very vital essence of a free government by consent of the governed)?

"Suppose, again, that upon a pretense ... it should undertake to abrogate (Freedom of Speech and Equal Rights) would it not be equally evident that this was an invasion of (the very existence of America as a constitutional Republic?)"

Paraphrased from *The Federalist Paper, No. 33*

* * *

"Candidacy for public office is one of the ultimate forms of political expression in our society and is therefore protected by the First Amendment."

Edwards v. Reynaud, 463 F.Supp. 1235

The FCC's claims are unconstitutional because they put "*substantially unequal burdens on both the Right to Vote and the Right to associate.*"

Williams v. Rhodes, 393 U.S. 23 at 31; 89 S.Ct. 5 at 10, 21 L.Ed.2d 24 (1968)

FCC actions have irreparably injured Plaintiff Forbes and his most basic Rights violated by the FCC's unconstitutional burdens on "the right of individuals to associate for the

advancement of political beliefs; and the right of qualified voters, regardless of their political persuasion, to cast votes effectively." *Election Bd. v. SWParty*, 440 U.S. 173,184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230, 241 (1979)

Federal courts have jurisdiction when the effect of an act deprives plaintiffs of equal protections of the laws by debasement of their votes.

Anderson v. Celebrezze, 460 U.S. 780 (1983)
Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 83 S.Ct. 691
McLain v. Meier, 637 F.2d 1159 (1980) 8th Circuit
MacBride v. Exon, 558 F.2d 443 (8th Circuit, 1977)

* * *

PLAINTIFF'S RESPONSE - II -

RE: FCC's Brief For Appellant The Federal Communications Commission In *Gillett* Communications of Atlanta, Inc, V. Daniel Becker, Et Al., No. 92-9080 In The United States Court of Appeals For The Eleventh Circuit On Appeal From The United States District Court For The Northern District Of Georgia

STATEMENT OF THE CASE

The *Gillett v. Becker* case is in some respects relevant, *but in other's it is a convoluted mirror image that improperly understood or applied could result in tortured conclusions diametrically opposite to facts, reason and justice.*

1. [a] The plaintiff, *Gillett* aka "WAGA-TV5," in that case is an FCC licensed entity;

But [b] the plaintiff in this case is a natural person, citizen and a qualified at the time congressional candidate with innate, inalienable rights not subject to FCC regulation.

2. [a] The ads in that case were challenged for indecency because they included depictions of "female genitalia, the uterus, excreted uterine fluid ..."

[b] The Forbes' ads did *not* include any of these, but rather footage *explicitly approved by the FCC* for use in such ads. Ironically, this footage used by Forbes was again approved by the FCC in the Becker case.*

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* In August 1992, prior to bringing this suit, Gillett and a private law firm filed "petitions for declaratory ruling" with the FCC, seeking a determination that a broadcaster may, consistent with the Act, channel to early morning hours anti-abortion political advertisements featuring graphic depictions of dead fetuses. The petition specifically cited an earlier anti-abortion political advertisement submitted by Becker and which WAGA-TV5 had aired on July 19, 1992 at 7:58 p.m. See exh. A-l to Becker's Oct. 29, 1992 Memo. In Opp. (R1-4).

In an order issued August 21, 1992, the FCC Staff denied Gillett's and the law firm's petition. See Exh. A-l to Becker's Oct. 29, 1992 Memo. In Opp. (R1-4), reported in Letter to Vincent A. Pepper, 7 FCC Rcd 5599 (MM Bur. 1992). The Staff ruled that "[t]o the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue -- is indecent, we decline to so rule." (Id. at p.2). The FCC Staff further ruled that "[a]s a general matter, broadcasters may not direct candidates to unwanted times of the day or evening." (Id. at 3). *The FCC Staff then went on to examine the earlier tape submitted by Becker and aired by WAGA-TV5 and concluded that this specific advertisement* (which included the footage already approved by the FCC and used by Forbes) *was "not indecent."* (id. at 4).

"It is this *second* (genitalia) tape (*not* the FCC-approved Forbes' tape) that is at issue in this case." FCC Brief before the 11th Circuit at 8

3. [a] Gillett (WAGA-TV) sued the FCC asking the district court to enjoin the FCC from taking any regulatory action against WAGA-TV either for channelling the Becker videotape to the hours of 12:00 midnight and 6:00 a.m., or in the alternative, for broadcasting [the Becker tape] at the time requested by Becker and his Campaign.

[b] Forbes did not sue the FCC.

Quoting the FCC Brief at 4: In an order entered October 30, 1992, the district court ruled that it had jurisdiction over the complaint. (Slip op. at 6) (R1-6-7). The court acknowledged that the Hobbs Act, 28 U.S.C. 2342(1), accorded the courts of appeals exclusive jurisdiction over FCC orders. The court, however, noted that because the FCC had not issued an order in this case (none having been sought by WAGA), the issue was not one of jurisdiction but of whether the court should defer to the "primary jurisdiction" of the FCC. Concluding that the nearness of the election and the legal nature of the

questions presented militated against such deference, the court declined to require Gillett (an FCC regulated licensee) to exhaust its administrative remedies before the FCC.

Under the communications Act of 1934, 47 U.S.C. 151 et seq., Congress has expressly authorized the FCC *to regulate the telecommunications industry* (not the people). It has vested the FCC with authority to conduct administrative proceedings necessary to resolve matters arising under this mandate. Under 47 U.S.C. 151, the FCC is charged with the duty to "execute and enforce the provisions of this chapter [47 U.S.C. Ch. 5]." Under 47 U.S.C. 154(j), the FCC is required to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business *and to the ends of justice.*" Section 312 of 47 U.S.C. at issue in the Becker litigation empowers the FCC to "revoke any station license or construction permit" and provides for such revocation "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified Federal candidate for Federal elective office on behalf of his candidacy." (47 U.S.C. 312(a)(7).[2] Prior to such a revocation, the FCC must serve upon the licensee a show cause order and permit the licensee to appear before the Commission. (47 U.S.C. 312(c)).

Section 315(a), 47 U.S.C. 315(a), also involved in this litigation, provides that if the licensee should permit any legally qualified candidate for any political office to use the broadcasting station, then the licensee "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[3] Section 315(a) further provides that the licensee "shall have no power of censorship over the material broadcast

[2] 47 U.S.C. 312(a) provides:

The Commission may revoke any station license or construction permit - (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[3] 47 U.S.C. 315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.. Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

under the provisions of this section." Section 315(c) instructs the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

* * *

I. THIS COURT HAS JURISDICTION OVER THE FCC'S APPEAL

The Plaintiff is sufficiently aggrieved by the actions of the Defendants and the district court's order to have Article III standing to pursue this appeal.

In its appeal in *Gillett* the FCC claims that even when it wins in a court of law: "Such an order adversely affects the FCC in that it effectively deprives the Commission of its right to address these issues ..."

The FCC has no "right." The FCC claims in *Gillett* and its intrusion in this case parade the FCC's insatiable lust for usurpations and "turf."

This Court in the Hearing of October 21, 1992, took judicial notice that the natural rights of the people are paramount and supreme and that the rights of plaintiff as a natural person and citizen are inalienable in response to plaintiff's **Demand for Declaratory Judgment**. The FCC is a creature of the Congress. The Congress is a creature of the People, which has been delegated certain powers, but limited by the Constitution {Article I} and Law of the Land. The Bill of Rights enjoins Congress from abridging Rights of Free Speech, denying Due Process, Equality before the Law, etc. The FCC has no lawful authority to do what Congress may not do, nor pretend to "permit" licensed entities to violate rights, the Constitution and the laws. The FCC has duties to the people and certain powers to regulate licensed entities; *but the FCC has no rights!*

The FCC's claims in this case would effectively eliminate the ability of the Court to exercise its jurisdiction in these kinds of cases -- a fatal harm to the Constitution and to the paramount public interest. These harms to the people and the plaintiff are sufficient to accord it Article III standing to have remedy at law.

The FCC admits at 14: "Becker, of course, has incontestable standing to appeal the district court's judgment." So does Forbes.

II. The FCC States: "The District Court Lacked Jurisdiction Over The Subject Matter of Plaintiff's Complaint"

IF this be so (that jurisdiction properly lies in the circuit court), *then the district court in this case lacked jurisdiction to dismiss it,* and should have directed this case to this honorable (8th Circuit) Court.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive Jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

In any event the FCC admits that this Court is superior to it and its "orders."

This is an action at Law invoking Common and Natural Law and important constitutional issues, not admiralty, nor maritime, nor commercial, etc. jurisdictions.

Ultimately, the Courts have jurisdiction over administrative actions.
Shaughnessy v. Pedreiro, 349 U.S. 48; 75 S.Ct. 591; 99 L.Ed 868;
Wong Yang Sun v. McGrath, 339 U.S. 908; 70 S.Ct. 564

The only administrative record in this case is *inaction,* foot dragging, non-responsiveness and hostility by the FCC to the plaintiff's claims. Nevertheless, the FCC points out that the Supreme Court held that "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court."
(*Florida Power & Light Co. v. Lorion*, 470 U.S. at 740 (1985))

There is a record before this Court. To send it somewhere else would create "the duplication of effort" that should be avoided.

The People through the Constitution vested Judicial power and primary jurisdiction to the Courts of Law. The FCC's claims to usurp that power are unconstitutional. Whether Congress "authorized" the FCC to abrogate the Con-

stitution is simply not relevant, because Congress has no authority to abridge irrepealable Law.

The question is whether the Court (yet) has jurisdiction to decide constitutional questions, *or whether the FCC and its pretended powers and orders have supplanted the Constitution as the supreme Law of the Land.*

Indeed, acceptance of the FCC's "reasoning" would mean that the jurisdiction of the courts would turn on the "expert opinion" of this unelected bureau.

Denying Citizens their right to justice in the Courts, forcing them to jump through the FCC's hoops with its attendant delays would mean that 47 USC 312 and 315 and the First and Fourteenth Amendments, et seq., would never be enforced; and the FCC and its favored licensees would control the minds of the people.

More fundamentally, the FCC is empowered to enforce the "reasonable access" provisions of section 312(a)(7). But when the FCC fails in this particular case, and as a pattern, to perform its clearly mandated duty to provide "an affirmative, promptly enforceable right of reasonable access" by ordering the licensees to obey the law, then the Courts of Law become the only proper forum for redress and remedy.

III. WHETHER "GILLETT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES" OR NOT IS IRRELEVANT; *BECAUSE THE FCC's & THE DEFENDANTS' DEMANDS AGAINST FORBES ARE UNREASONABLE*

A. *Gillett*, as a regulated fictitious entity, is subject to lawful FCC authority;

B. But the people, the plaintiff, natural persons and citizens and their rights, are not.

The Constitution and Unbridgeable Rights are not to be short-circuited by spurious claims that "The Exhaustion Doctrine Is Jurisdictional And Requires Exhaustion of Administrative Remedies Before the FCC."

Nevertheless, Plaintiff Forbes applied to the FCC to enforce the law. The FCC said it would not. They claimed their own interpretations of their own regulations superseded the Constitution and laws. The FCC demanded that plaintiff be compelled to submit to a "procedure" that could not possibly be "exhausted" until after the election was over and which would result in an inevitable denial of the rights asserted by the FCC. Only after the recourse of appeal to the FCC and the Defendants to obey the law was exhausted, time had all but run out, and further reliance on the FCC was rigorously futile did Plaintiff commence this Action.

Two centuries before the landmark *Marbury* decision, Lord Coke in Dr. Bonham's case (1610) declared: "[T]hat when Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

(*cf., Fed.Rules Civ.Proc. Rule 81 (a)(2), 28 USCA.; Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.Ed 873, 19 S.Ct. 580)

* * *

An excellent discussion re immunity from futile, irrational and unreasonable requirements is found in Mr. Justice BREWER's Opinion in *Church of the Holy Trinity v. U.S.*, 12 Sup. Ct. Rprtr. 511 (1892).

"... ((S)ince) men are furnished with powers of reason, it is obviously the design of the Creator that reason should be employed as their guide in every stage of life ..."

Noah Webster: *Letters to a Young Gentlemen Commencing His Education*

Plaintiff Forbes believes *his rights and the rights of the people come from God.* They are not "granted" by government, *but secured by the Constitution.* To surrender these rights, to reduce them to mere privileges that may be permitted or denied by men, by caprice or whim, is selling one's God-given heritage for a mess of pottage, and therefore a sin; and a betrayal of predecessors, who sacrificed so much for our rights and liberties. No one should be compelled to do that which is unreasonable, irrational, harmful and dangerous, especially when such acts violate one's religious beliefs, prin-

ciples, and conscientious scruples.

The Jurisdiction of the Courts of Law over cases of constitutional controversy, common law, monetary value in controversy, etc. *is mandated by the Constitution.*

Plaintiff Forbes gave the FCC more than a 'fair opportunity' to pass on a legal or factual argument" by asking the FCC to speed up the foregone denial so that he could escape irreparable injury by appealing the FCC's "automatic" denial in sufficient time before the scheduled AETN staged debate.

In this case the FCC confuses the people whom it serves with the licensed entities it is charged with regulating and the doctrine of exhaustion with the fundamental rule that:

"All laws which are repugnant to the Constitution are *null and void.*"

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 176; 2 L.Ed 60 (1803)
Norton v. Shelby County, 118 U.S. 425, 442
16th American Jurisprudence, 2d., Section 256

The FCC, which can give no remedy to the Plaintiff, would also cut off all redress to the Courts. On the one hand, the FCC, which gave only a *de facto* "order" in this case says, "... a court of appeals would not have jurisdiction to entertain a suit arising under the Federal Communications Act in the absence of a FCC order" (at 26); but, on the other hand, the FCC wants to have it both ways by also claiming the district court has no jurisdiction because *the court of appeals has exclusive jurisdiction.*

B. The Exhaustion Doctrine Whether Applicable Against The Gillett Licensee or Not, *Is Not Applicable Against Plaintiff Forbes*

The exhaustion doctrine is inapplicable against Forbes for each and all of the following reasons:

[1] There is no "relief is available from the agency" for any of the Plaintiff's claims.

[2] The Gillett case resembles the KHOG Defendants' ac-

tions in that the ABC affiliated Defendants censored ads they opposed based on content *even though the content had been approved by the FCC,** the agency that is charged with regulating the KHOG Defendants.

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*"FCC staff's August 1992 ruling ... addressed an earlier advertisement by Becker, which had already been broadcast, and found that the advertisement *was not indecent.*" FCC Gillett Brief at 32.

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[3] The exhaustion doctrine is inapplicable against Forbes because the KHOG censorship resulted from a last minute FCC ruling at the end of the business day on Friday, October 30, 1992. (FCC Gillett Brief at 11) The ruling was worded in such a way that licensees who opposed Pro-Life candidates, such as Plaintiff Forbes, could falsely use it as a pretext to censor approved ads* *even though everyone involved knew the ruling did not and could not lawfully infringe against the FCC approved ads.* {Plaintiff's Amended Complaint at 3-6, Attachment Exhibits #s 16, 17 & 18} The FCC was not open for business until Monday, November 2nd, *the day before the election.* Even if the FCC were to forthwith order all offending licensees who wrongfully used the irrelevant October 30th Gillett ruling to run the ads *it would be too late to have righted the irreparable wrongs.* The exhaustion of time was of the FCC's and the Defendants' own making. (47 C.F.R. §73.1944 (b) provides: *Weekend Access.)*

[4] While it is true that "the FCC is charged with administering the reasonable access and no censorship requirements of Sections 312(a)(7) and 315. It is the Courts of Law that enforce the Constitution and mandate and enjoin state agents such as the FCC and AETN to obey the Constitution and Laws.

[5] The FCC claims to be the "experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and the Commission is responsible for implementing and enforcing § 312(a)(7) of the Communications Act."

Our Founding Fathers warned us about putting blind trust in any men or governmental agency. They said eternal vigilance

was the price of liberty and that even the best of men had to be bound by the chains of the Constitution. For most of its history the FCC did its job well. In fact its chief officials forewarned us time and again against exactly what this Complaint and Appeal remonstrates against. (*e.g., 25 F.C.C.2d 216, 232.*)

As for putting the fate of the freedom in the hands of present FCC "experts" on Free Speech and Equal Protections and Due Process, Plaintiff poses this question:

What would be the state of America and the world today if our technological progress were left in the hands of these past examples of bureaucratic expertise?

(1 In 1899, the Director of the U.S. Patent Office, Charles H. Duell, in his expert wisdom profoundly declared: *"Everything that can be invented has (already) been invented."*

(2 In 1903 the patent office rejected the Wright brothers' patent for an airplane, because these bureaucrats assuming the role of infallible scientific experts declared it was *"a device that is inoperative or incapable of performing its intended function."*

[6] It is beyond dispute that the relief that Congress provided for deprivations of rights through 28 *USC 1331, 1343, 42 USC 1983, 1985*, et seq. is to be obtained from the Courts of Law, not the FCC. This Court, not the FCC, is fully and uniquely competent to award the relief law and justice demand. Please see Plaintiff's **Appeal from "Order to Dismiss,"** pp 13~32.

[7] The FCC's and Defendants' attempt to end-run the Constitution and the Court's jurisdiction threatens and undermines the people's authority and rights to informed self-government.

[8] Plaintiff Forbes has an unshadowed right to pursue this case because:

(A) There is clear evidence that exhaustion of administrative remedies will result in irreparable injury;

(B) The agency's jurisdiction over the Constitution and the People is plainly lacking; and

(C) the agency's special expertise will be of no help on the question of its jurisdiction.

There can be no question that the Court has clear juris-

diction over the constitutional and statutory subject matter of Forbes's complaint. The FCC simply ignored the plain language and clear intent of the laws.

[9] Because the FCC acted quickly against Becker does not change the fact that the FCC told Forbes they would *not* act in his case until after the election. If anything it shows that the FCC is capable of acting quickly *if it wants to.* In the *Gillett* case, the FCC had a strong interest in "proving" that "Gillett obviously had plenty of time in which to seek emergency FCC relief,"

[10] Nor can the FCC's and Defendants' attempt to circumvent the Constitution and laws be excused by any suggestion that resort to the FCC would not have been futile.

[11] The FCC claims that "the licensee is not required under Section 315(a) to air that advertisement outside the 'safe harbor' period[2]" even when there has been no FCC ruling on the ad. The FCC thus claims to have the power to do what the Courts have prohibited: exercise prior restraint against speech.

Yet, even though the FCC purports to grant this power of censorship to licensees, the FCC itself does (not yet) claim the absolute power to exercise prior restraint:

> 2 The October 30th ruling did not involve a determination as to whether the advertisement in question, which had not been aired, was legally indecent. The FCC's current policy is to refrain from rendering indecency rulings in advance of broadcast." at 32

It is apparent that *the real reasons* the FCC acted so quickly *re Becker*, even if it violated prohibitions against prior restraint, were to: (1) deny Becker's second ad even before a determination; (2) give licensees throughout the nation *a pretext to harm Pro-Life candidates' chances for election in the current congress;* and (3) short-circuit Gillett's "shortness-of-time" argument.

While it is true "Congress has entrusted implementation of the fair access and no censorship provisions of the Act to the FCC," including the power "to enforce these provisions by revoking Gillett's license;"

Even if the FCC were to revoke the licenses of Gillett *and*

AETN and KHOG, etc., this would provide no remedy for the irreparable harm done to Plaintiff and the People of Arkansas.

The FCC admits the present scheme is not working well, to say the least. It claims to have initiated "public comment proceedings" on these issues. The FCC "opined that these issues 'present extremely difficult questions that would best be resolved with the benefit - of full public comment.'"

Plaintiff is one member of the "public" who has not been invited by the FCC to comment, and Plaintiff "opines" that very few persons, if any, of the public (other than licensees or their counsel) in the 3rd congressional district of Arkansas and far less than 1% of the People who constitute the American Public have been invited by the FCC to comment on these "extremely difficult questions."

The Constitution, the First, Fifth and Fourteenth Amendments and the law, including *47 USC 312 & 315*, have already "pre-judged" "the rights of candidates" and mandated the FCC's duties to enforce the law against violations and unequal, discriminatory, capricious or malicious transgressions. The Constitution has effectively given the Courts jurisdiction to protect the rights of the people and to compel governmental agencies and agents to obey the Constitution and inferior laws.

Quoting the FCC Brief at 34: "Under the All Writs Act, *this Court has jurisdiction to review any FCC failure to act promptly and would likewise have full jurisdiction to enter any other order necessary* to protect" the inalienable, fundamental rights of the people and the plaintiff. (28 USC §1651)

THEREFORE, from all of the above, this honorable Court, not the FCC has jurisdiction in (this) case and this Court should order summary judgment in Plaintiff's favor forthwith.

* * *

PLAINTIFFS' RESPONSE - III -

To The FCC's Brief From The University of Houston, et al., Defendants-Appellants v. Gertrude *Barnstone*, et al., Plaintiffs-Appellees.

STATEMENT OF THE ISSUE

(This) case is ***NOT*** "whether the First Amendment prohibits a television station licensed to a government entity from deciding not to broadcast a particular program."

But rather (this) case is a question of whether the Constitutions and laws of the United States and the State of Arkansas, respectively, including the Fourteenth, Fifth and First Amendments prohibits a television station licensed (by the FCC) from censoring viewpoints, unlawfully discriminating against persons and classes of person and denying the people their paramount right to be an informed electorate.

Factually, *Barnstone* is so different from (this) case as to be irrelevant, but the FCC's Brief in that case yields some telling points.

Ironically, the FCC's case is predicated upon the FCC-revoked *Fairness Doctrine*.

"FAIRNESS:" The FCC's "SUMMARY OF THE ARGUMENT" at 8

"The Federal Communications Commission administers a scheme of broadcast regulation which carefully balances the rights of both broadcasters and the public. While *broadcasters are required to present programming* which satisfies the needs of their communities and *which, under the Fairness Doctrine, presents contrasting viewpoints on controversial issues of public importance,* broadcasters are also accorded wide editorial discretion in achieving those goals."

The FCC used its self-described "great expertise" to "greatly disrupt the carefully balanced scheme of broadcast regulation," which "as a practical matter, diminishes, rather than enhances, the First Amendment rights of viewers." Therefore, this Court should vacate the order of the court below and hold that broadcast stations ... must afford equal access and opportunities to candidates and not censor free speech.

The FCC's "ARGUMENT" at 9 says:
"I. *THE DELICATELY BALANCED SCHEME* OF BROAD-

CAST REGULATION ADMINISTERED BY THE FCC IS CAREFULLY DESIGNED TO PROTECT THE FIRST AMENDMENT RIGHTS OF BOTH BROADCASTERS AND THE PUBLIC.

"The statutory scheme of broadcast regulation has always been inspired by First Amendment values." See *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 122 (1973). (This was *after* the FCC pledged never to "discard" Fairness; (*but*) before the FCC discarded Fairness.)

Plaintiff asks, then ***why*** did the "entrusted" FCC use its "great expertise" to destroy this "delicately balanced scheme ~ inspired by First Amendment values."?

Ironically, in the footnote at 10 the FCC argues that licensees may not unlawfully discriminate ...

" 5/ License renewal may be denied for failure to broadcast programming to meet the community's needs. See Alabama Educational Television Commission, 50 FCC 2d 461 (1975), where the licensee, a state instrumentality, was denied renewal for its eight television stations *because it discriminated against blacks in its programming.*"

The FCC says at 11-12:

"In addition to *the fundamental duty of broadcasters* to offer programming which is responsive to the needs of their communities, the Commission, with subsequent *specific* -12- *congressional approval,*7/ *has developed the Fairness Doctrine.*

7/ The 1959 amendments to Section 315(a), the political broadcasting provision, included the following sentence:

"*Nothing in the foregoing sentence shall be construed as relieving broadcasters,* in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this Act* to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

Act of Sept. 14, 1959, §1, 73 Stat. 557, 47 U.S.C. /315(a). See also *CBS, supra*, 412 U.S. at 110 n.8.

"This Doctrine *requires broadcasters* (1) 'to devote a reas-

onable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community...' *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249 (1949), and (2) *to afford 'reasonable opportunity for the presentation of contrasting viewpoints' on controversial issues of public importance. Fairness Report*, 48 FCC 2d 1, 10 (1974), *aff'd in part and rev'd in part sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978)." @12

The existence of the Fairness Doctrine is particularly important in considering whether the public forum doctrine should apply to broadcasting stations. The Supreme Court *was referring to the Fairness Doctrine* when it said:

> 'Those [public forum] decisions provide little guidance, however, in resolving the question whether the First Amendment requires the Commission to mandate a private right of access to the broadcast media. In none of these cases did the forum sought for expression have the affirmative and statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees.'
>
> *CBS v. DNC*, 412 U.S. 94, 129-30"

This of course was back when the FCC agreed with the Supreme Court that *the Fairness Doctrine was seen by Congress as the "ultimate check" over ... licensees.* @ 13

The FCC admits that "public forum" decisions provide little guidance in resolving private right of access. But in any case this ... case is *not* a quest for "private" right of access, but a fight for the right of *paramount public access,* constitutional and statutory mandated access and equal protection of the law.

(*Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975; *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966))

The Fairness Doctrine runs through the FCC's *Barnstone* brief like a life line. Thus, when FCC reversed itself on Free Speech and Equal Access and revoked this vital, "ultimate"

congressionally sanctioned Fairness Doctrine, it "eviscerated the carefully developed scheme by which Congress, the courts, and the FCC have accommodated the First Amendment rights of broadcasters and viewers" and "spelled the end of public broadcasting as it existed" when *Barnstone* and *Muir*, etc. were decided. The public's access to "social, political, esthetic, moral, and other ideas," *Red Lion, supra*, 395 U.S. at 390, has inevitably been diminished, rather than enhanced, as a result.

The First Amendment should not be read to abridge Free Speech, *but to protect it.*

In his classic essay, "*Politics and the English Language,*" George Orwell translated a once familiar biblical passage into the bureaucratic jargon that has displaced the clear language that our forefathers used to communicate great thoughts:

> "Objective consideration of contemporary phenomena compels the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must invariably be taken into account."

Here's the older, clearer version:

"I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to the men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all." Ecclesiastes 9:11

In the King James tongue, that truth is discernible. Likewise, in the Constitution, The Declaration, the Federalist Papers, Blackstone, Montesquieu, etc., the truth is crystal clear for those who have eyes to see; but the mountains of "regulations," the bureaucratic "interpretations" of their own red tape, enshrouded in obnoxious oxymorons, grinding out with monotonous repetition from the "Ministries of Truth," the FCC, hides the light in the gross darkness of Orwellian "double-think."

The soul of our Bill of Rights has been enervated, the meaning obscured, the simple made abstruse, and any repair

to History, Principle and Truth are branded as heresy, punished as political psychosis or ridiculed as outmoded anachronisms that have no place in the "politically correct" new world order that seeks to supplant our Republic.

Yes, those with the usurped powers still pay lip service to the bedrock principles they have reduced to meaningless mantras and insipid slogans. Even as they silence, suppress, censor and control the mass media, they hypocritically mutter what they have transmogrified into nothing but tired, old, but comforting shibboleths: "Free Speech is the power of the media-meisters to impose Censorship 'for the public's paramount interest'!" "All are Equal, but some are much more Equal than others!" And all the other solemn idiocies of the politically correct politburo.

Why not surrender our God-given Rights to them? Why not let them decide for us what we are supposed to think? Why not forfeit the right to choose how to live our own lives to those who claim to have "expertise" above and beyond us ordinary mortals, including the Framers, and the Constitution they bequeathed to us? It's so much easier than thinking.

Or contesting for one's rights against all but impossible odds.

Why not? Because, "*the only thing necessary for evil to triumph is for good men to do nothing.*"

Edmund Burke, Letter to William Smith, January 9, 1795

Because: The attempts by the FCC and all of the other self-anointed nomenklatura to rationalize their tyrannical usurpations in the name of "free speech," if not challenged and stopped, will pervert the sacred to the profane, crush Liberty under despotism, and twist every virtue into vice with worm-tongued deceptions, "like whited sepulchres full of dead bones, all uncleanness, hypocrisy and iniquity."

Woe To Those Who Call Evil Good, *And Good Evil;* Who Substitute Darkness For Light *And Light For Darkness;* Who Substitute Bitter For Sweet, *And Sweet For Bitter!* Isaiah 5:20 (NASB)

Woe to those who ... justify the wicked for a bribe, And take away the rights of the ones who are in the right!
Isaiah 5:23 (NASB)

Woe to those who enact evil statutes, And to those who constantly record unjust decisions, So as to deprive the needy of justice, And rob the poor of My people of [their] rights, In order that widows may be their spoil, And that they may plunder the orphans. Isaiah 10:1,2 (NASB)

Why not surrender? Because: When the wicked rise to power, people go into hiding; but when the wicked perish, the righteous thrive. Proverbs 28:28 (NIV)

"Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, almighty God. I know not what course others may take, but as for me, give me liberty or give me death."

Patrick Henry,
Speech in Virginia Convention, Richmond, March 23, 1775

* * *

Choose you this day whom you will serve ...
But As For Me And My House, We Will Serve The Lord.
Joshua 24:15

Therefore, from all of the foregoing, both (of) the FCC Briefs re *Gillett* and *Barnstone* support Plaintiff's Cause at every relevant point, and Plaintiff is entitled to Summary Judgment on the Constitution and record before this Court.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person

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CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I have sent a copy of the Opposition to FCC "Amicus" Brief this 7 day of September, 1993, to the following Defendants, interested persons and/or their attorneys at the following addresses:

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s/ Ralph P. Forbes

RALPH P. FORBES

APPENDIX Z

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION
COMMUNICATIONS NETWORK
FOUNDATION, et al.,
APPELLEES,

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

"A NATION THAT IS AFRAID TO LET ITS PEOPLE JUDGE THE TRUTH AND FALSEHOOD IN AN OPEN MARKET IS A NATION THAT IS AFRAID OF ITS PEOPLE."

JOHN FITZGERALD KENNEDY

COMES NOW, RALPH P. FORBES, APPELLANT in the above styled matter and respectfully petitions this Court for Rehearing *en banc* as to portions of its Judgment and Opinion issued April 28, 1994, and apologizes to this honorable Court for his inefficient presentations to the Court, in apparently failing to properly show the facts, law and issues in important parts of this matter.

This is **not** an "FCC" case. ***This is a Civil Rights case in which all Rights secured by the Constitution are inextricably implicated.***

This is **not** a case "to enforce *47 U.S.C. §315*." It ***is*** a case to enforce the Constitution including the Bill of Rights and the 14th Amendment and seek appropriate redress for those injured under law.

It is true that originally emergency injunctive relief "to enforce *47 U.S.C. §315*" was sought on several occasions. However, once the damage was done, neither the defendants, nor the FCC, not even this Court had any injunctive powers to grant "relief with respect to it to have any meaning."

Nevertheless, "The underlying case is not moot."

Finding of Eighth Circuit Court's Order in this matter dated December 22, 1992.

The several preliminary petitions for enforcement of *47 USC § 312, 315* all became moot after the election; the claim for reparations for violations of rights became (or *should* have become) germane and central at that time.

The *only* relevance of *47 USC § 312, 315* in this matter now is *primarily because the defendants misused them to color their violations, denial and deprivation of constitutionally protected rights "under color of law;"*

And, secondarily, because the defendants violated these statutes enacted to regulate them and to protect the public and citizens from precisely the kind of acts complained of in this matter. *

* Licensed broadcaster *must* "conduct himself as a proxy or fiduciary" "to present the views ... *which would otherwise be barred from the airwaves.*"

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367; 389 S.Ct.. 1794, 1805; 23 L.Ed2d 371 (1969)

However, because of the premature "dismissal with prejudice" out of jurisdiction; and the "FCC" clamour of the defendants and the numerous "amici," including the FCC itself, I was forced into a defensive posture countering all the "FCC" diversions and distractions, so the focus of the contest was never properly directed to the fundamental, paramount constitutional questions. For not being sharp enough to counter this strategic misdirection, I apologize to this Court; and I shall use this request for Rehearing to bring the real issues into focus.

KEY ISSUES & SELECTED CITATIONS

In respect to the statutory claims, the Court said it agrees with the District Court and the private stations that the com-

plaint cannot stand. (Opinion of April 28, 1994, at 6) This is what I believe must be reconsidered, but long hours of searching through the letter (there was no opinion, finding of fact nor conclusion of law by the District Court) based upon *DeYoung*, now reversed by this Court; the briefs of the defendants, etc., I am unable to find with any degree of reasonable certainty what is the basis for the bald statement, the Complaint cannot stand.

Unlike the dissenting opinion which outlines the answer for the defendants, there are no specifics, no findings of fact nor conclusions of law, no guide lines for the plaintiff to debate or follow.

Therefore, I am forced to present my case for rehearing on intuition, a sort of legal blind man's bluff. However, I believe that looked at in the light of what this case really is about, the Constitution and self government by a free people vs. a police state ruled by arbitrary permission in accordance with the politically approved views of the hour; and *not* a case of FCC procedures, then virtually every case cited in my briefs submitted in this matter, no matter how inadequately presented, require that the Complaint *must* stand.

"As the Supreme Court unanimously held in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; 89 S.Ct. 1794; 23 L.-Ed.2d 371 (1969):

'It is the right of the viewers and listeners, not the right of the broadcasters *which is paramount.* It is the purpose of the First Amendment *to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,* rather than to countenance monopolization of the market, whether it be by the government or a private licensee. *It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.* ***That right may not constitutionally be abridged.'***

Red Lion, at 395 U.S. at 390, 89 S.Ct. at 1806 (by reference all the citations used by the Court.)

"... ('[S]peech concerning public affairs is more than self-expression; *its is the essence of self-government.')* Self-government suffers *when those in power suppress competing*

views on public issues... First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978)

"It is particularly important that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and positions on vital public issues before choosing among them on election day."
Buckley v. Valleo, 424 U.S. 1, 52, 53 (1976)

"* * * It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. § 1985(3)."
Means v. Wilson, 522 F.2d 833 at 838 (8th Cir. 1975) citing;
Griffin v. Breckenridge, 403 U.S. 88, 106;
91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)
United States v. Classic, 313 U.S. 299, 314-315,
61 S.Ct. 1031, 85 L.Ed. 1368 (1941)
Ex Parte Yarbrough, 110 U.S. 651, 658-662,
4 S.Ct. 152, 28 L.Ed. 274 (1884)

"Today we hold that 42 USC § 1985(3) protects the right to vote in ... elections against interference from private conspiracies as well.

"Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote ... may be vindicated under 42 U.S.C. § 1985(3) as a deprivation of equal protection of the laws or equal privileges and immunities under the law."
Means v. Wilson, 522 F.2d 833 at 839 (8th Cir. 1975)

The record and the appended Affidavits of fact clearly show that *like Russell Means, I sought relief [through ... channels] and was denied an effective timely remedy.*

"* * * We express no view of whether exhaustion of tribal remedies is a prerequisite of federal relief ... because we find that

the plaintiffs made every reasonable attempt to exhaust their ... remedies. . . We find that plaintiffs have done all they could to exhaust ... remedies in this case, but their right ... has been frustrated by inaction ... 'The plaintiffs sought relief [through ... channels] and were denied an effective timely remedy.' " *Brown v. United States,* 486 F.2d 658, 661 (8th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 837 (8th Cir. 1975)

I am respectfully requesting equal application of the laws as accorded by this Court to Brown, Kwoun and Means, et seq., in equal or similar circumstances.

Community Television of So. California v. Gottfried, 459 U.S. 498 (1983) was a case seeking to invoke the Rehabilitation Act to mandate special broadcasting technologies for the hearing impaired. Factually, the case is not relevant to the present case, *but it is of particular note there was no question that plaintiff had a private cause cause of action and a remedy at law under the Communications Act.*

"Our cases have firmly established that (constitutionally protected rights do) not necessarily rest on the Fourteenth Amendment, and (claims are) assertable against *private* as well as governmental interference. *Shapiro v. Thompson,* 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *id.,* at 642-644, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest,* 383 U.S. 745, 757-760 and n. 17, 86 S.Ct. 1170, 1177-1180, 16 L.Ed.2d 239; *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97; *Slaughter-House Cases,* 16 Wall 36, 79-80, 21 L.Ed. 394; *Crandall v. Nevada,* 6 Wall 35, 44, 48-49, 18 L.Ed. 744; *Passenger Cases (Smith v. Turner),* 7 How. 283, 492, 12 L.Ed. 702 (Taney, C.J., dissenting).

The Supreme Court decided in 1971 to "*accord the words of the statute their apparent meaning*" and held section 1985-(3) *provided a civil remedy for damages against wholly private infringements of constitutionally protected rights.*

Griffin v. Breckenridge, 403 U.S. 88, 97; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 345 (1971)

Ultimately, the Courts have jurisdiction over administrative actions.

Shaughnessy v. Pedreiro, 349 U.S. 48; 75 S.Ct. 591; 99 L.Ed 868; *Wong Yang Sun v. McGrath*, 339 U.S. 908

Re *Wong Yang Sun* please see Plaintiff's *Appeal from Order to Dismiss* at 24 and 25.

NEW CASE

National Organization of Women v. Scheidler, 92-780 decided *unanimously* by the Supreme Court January 24, 1994, demonstrates that the Court strongly adheres to a very literal interpretation and construction, that *statutes mean what they say,* not what may or may not be read into them or implied, such as "if *42 USC 315* was not specifically included under 'any' in *42 USC 1983* then defendants may use it with impunity to violate the Constitution and the rights of anyone less equal."

Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme Court's approach to other Reconstruction civil rights statutes in recent years *to "accord [them] a sweep as broad as [their] language."*

Griffin v. Breckenridge, 403 U.S. 88 at 97; 91 S.Ct. 1790 at 1796; 29 L.Ed.2d 338 at 345 (1971) ...

There shall be: "Civil Action For Deprivation of Rights" for "*Every* person who, *under color of any* statute, ordinance, *regulation*, custom or usage* ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any* rights, privileges or immunities *secured by the Constitution and laws,* shall be liable to the party injured *in at action at law,* suit in equity, or other proper proceeding *for redress ...*"

Title 42 USC, Section 1983

*It does ***not*** say "except for *42 USC 312* and *315*."

DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another person is injured in his person or property,

or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived* ... (*must waive his constitutionally protected rights and beg an unelected FCC bureaucrat to be judge, jury and executioner even though such bureaucrat is without any power to repair damages to the injured party) ...

*Nay, it says: "*may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.*"

Title 42 USC, Section 1985 (3)

"*** and such *damages may be recovered in an action on the case;* ***" *Title 42 USC, Section 1986*, et seq.

Thus, I respectfully submit that a literal reading of the statutes entitles me my day in court. I also respectfully submit that a thorough study of congressional intent as to both the Title 42 and the Title 47 statutes invoked further strengthen and enforces my contentions as to what ever weight the Court may give them.

This Court correctly found in *Means v. Wilson* that two groups of *the same* tribe of American Indians were classes within the ambit of these section by virtue of their *political* differences:*

"... in our opinion, the reasoning above quoted was and is valid in the light of *Griffin.* The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff (by petitions, votes, etc.) ... were a class against whom ... the defendants discriminated against because of their class membership. This brings their complaint within the ambit of 42 U.S.C. § 1985(3). *Cameron v. Brock,* 473 F.2d 606, 610 (6th Cir. 1973)."

Means v. Wilson, 522 F.2d 833 at 840 (8th Cir. 1975)

This Court also properly applied the statutes in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) in which worshippers at a predominantly white Catholic church were disrupted by black civil rights protestors.

A plaintiff may opt for a jury trial in an action founded upon *Bivens v. Six Unknown Fed Narcotics Agents*, 403 U.S.

388; 29 L.Ed.2d 619; 91 S.Ct. 1999, in which it was recognized that in some circumstances the victims of a violation of the Federal Constitution ... have a right to recover damages ... in federal court *despite the absence of any statute conferring such a right.* [Italics added]

Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468; 64 L.Ed.2d 15

"* * * **Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has *explicitly* indicated that such remedy is not available."**

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956) (Emphasis supplied.)

As the language of the statutes state plainly on their face, and more fully shown in Plaintiff's *Appeal from Order to Dismiss* at 14 - 32.

"* * * [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Bell v. Hood, 327 U.S. 678 at 684, 66 S.Ct. 773 at 777, 90 L.Ed. 939 (1946)

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2002,2004, 91 S.Ct. 1999 (1971)

Action v. Gannon, 450 F.2d at 1238 (8th Cir. 1971)

See also, *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36, 53 S.Ct. 454, 457, 77 L.Ed. 1011 (1933) (CARDOZO, J.); *The Western Maid*, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299 (1922) (HOLMES, J.)

"*** (Bureaucratic regulations) may not authorize federal agents (nor private persons) to violate the (Constitution). *Byers v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927); *Weeks v. United States*, 232 U.S. 383, 386, 34 S.Ct. 341, 342, 58 L.Ed. 652 (1914); *In re Ayers*, 123 U.S. 443,

507 8 S.Ct. 164, 183-184, 31 L.Ed. 216 (1887)

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Nixon v. Herndon,* 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Swafford v. Templeton,* 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); *Wiley v. Sinkler,* 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); {A long line of authorities re the Fourth Amendment here are cited by reference by plaintiff.}

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2004, 91 S.Ct. 1999 (1971)

"For we have here no explicit congressional declaration that persons injured by a ... violation of the (First and Fourteenth Amendments) may not recover money damages from the (defendants), but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation ... of his (constitutionally protected) rights, is entitled to redress his injury through a particular remedial mechanism normally available in the courts." {Supporting citations by reference.}

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2005, 91 S.Ct. 1999 (1971)

"In such cases there is no safety for the Citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime."

United States v. Lee, 106 U.S. 196, 219, 1 S.Ct. 240, 259, 27 L.Ed. 171 (1882)

In his concurring opinion Justice HARLAN argued that federal courts have the power under a grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right; the power to award damages for violation of "constitutionally protected interests" and he agreed "with the Court that *a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the (First) Amendment.*" (Italics supplied)

J. HARLAN contended the courts should protect rights: "Thus, in suits for damages based on violations of federal statutes, lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case Co, v. Borak,* 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210, 213, 65 S.Ct. 235, 237, 89 L.Ed. 187 (1944). *Cf. Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201-204, 88 S.Ct. 379, 385-387, 19 L.Ed.2d 407 (1967).

"... *But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.*" {Emphasis supplied.}

This is especially so when the absence of effective, alternative remedies renders the constitutional command a "mere 'form of words.' "

"The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. There we "implied"- from what can only be characterized as an "exclusively procedural provision" ... **We did so in an area where federal regulation had been singularly comprehensive *and elaborate administrative machinery had been provided.***"
{Emphasis supplied.} *Bivens*, Footnote 4

"... then it seems to me that the same statute {28 U.S.C. § 1331(a)} is sufficient to empower a federal court to grant a traditional remedy at law as well as equity.
Please see n. 6 in *Bivens* at 2009

"... For people in {Forbes'} shoes, it is damages or nothing... Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly place a value judg-

ment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles... it is important in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2006-2012, 91 S.Ct. 1999 (1971)

"The courts cannot rightly prefer, of the possible meaning of words of the Constitution, that which will defeat rather than effectuate the constitutional purpose."

United States v. Classic, 313 U.S. 299

This would be much more eloquent if my cause were defended by someone who perhaps opposed me and my views. But, unfortunately no such champion has come forth and it is speak for myself or surrender all that I hold dear and true. This I cannot do. It is true that this is an extremely difficult case for *anyone* to win, and that I, a non-lawyer, against a formidable array of specialists would be a tiny David against an enormous Goliath. Nevertheless, I believe a fair reading of the pleadings, the supplementary affidavits, entitle me to at least procedural discovery rights and the right to present my case to a jury; and that if they had done these things to anyone else, with other political views, less potent political and powerful opponents, etc., whether Bill Clinton, Russell Means, Jesse Jackson, Sheffield Nelson, etc., (as unlikely that some of them would be treated as "equally" as others) they, if discriminated against and their rights blatantly violated, would (and should) have their day in court.

There is a pervasive double standard and selective indignation throughout the media and certain elitist elements in our society. It is so imbedded that many cannot see the 2x4 in their own eye for the speck in the other's eye; but, the silenced majority sees the dual yardsticks all too clearly, and this bodes ill for the nation, like a pressure cooker or a volcano without a safety valve. In voluminous cases the Supreme Court, including *Opinion of Supreme Court of The United*

States in Planned Parenthood of Southeastern Pennsylvania, et a., v. Casey, Governor of Pennsylvania, et al., No.s 91-744 & 91-90, at 26 and *Olmstead v. U.S.*, 277 U.S. 438 at 485 (19-28), et seq., has stated the Courts have a clear duty to maintain the sense of justice and fair play the people require.

On the one hand scandalous, unsupported allegations against a judicial nominee with views similar to the plaintiff's are treated by the media as if they were holy writ; on the other hand, similar corroborated charges against a politician whose views are generally favored by the media are treated as if they were blasphemy or *lese majesty*. Free speech demands the media be allowed to treat these matters in a heavy handed, biased matter if they so choose; but the Constitution and laws require the Courts to insure that all persons and all view points, with special accords to those who may be unpopular because of latent bias, be afforded fair and even handed treatment under law. If I am allowed to express my views equally with my opponents I may or may not win elections. Win or lose, the nation is strong enough to endure my exercise of free speech and equal protections of the laws. But if my views, *or anyone else's are allowed to be suppressed* under any pretexts, *then the nation will be doomed to become a police state, by whatsoever title or name, and after a greater or lesser period of tyranny, society will collapse in anarchy bringing chaos that could dwarf the nightmares of Bosnia or Rwanda.*

By analogy I ask the Court to consider the old "South African Universal Suffrage Act," which allegedly guaranteed all persons (who met certain criteria) the right to vote and to compete equally in elections in South Africa. Supposedly the law guaranteed equal opportunities for all candidates to express their views to the public; however, all state licensed broadcasters routinely denied access to challengers of the regime. The state violated its own laws, by illegally and semi-secretly using taxpayers' monies to influence and control *even the privately owned mass media.* Injured opposition candidates could appeal to the "Commission of Free Speech," but the commission always delayed their rulings until after the elections and they always ruled against the challengers, creating an impressive line of precedents.

Theoretically, the afflicted opposition candidates could appeal to the courts once they exhausted all of their police remedies; but then the courts held the laws didn't mean what they said because the state had already provided means for grievances through its policing agencies and vicious cycles of hoops, endless loops and hopeless mazes. In the end, as in the case of the Soviet empire, even the most repressive police state measures, high technology, etc., could not maintain a regime that was no longer in touch with the people of the land.

Perhaps those who enforced these "laws" blinded themselves to injustice by telling themselves what they were doing was for "the good of society;" *but looked at objectively, such a system is abhorrent, indefensible and reeks with hypocrisy.*

Yet, are we not in the position of David, whose anger was greatly kindled when judging the words of Nathan the prophet? {II Samuel 12:1~15} God have mercy on us if our consciences are so seared we are beyond feeling the shame David felt when the truth of Nathan's words struck home:

America, *Thou* art the Nation! The God of Heaven has blessed thee with Laws, Justice, Righteousness, Liberty and Plenty! But thou has squandered thine inheritance, despised Justice and sold thy birthright for a mess of pottage! Woe unto the hypocrites, who strain at gnats while swallowing camels, who call good evil and darkness light, *for the parable against South Africa describes the "politically correct" suppression and police state bureaucracy that is supplanting the Constitution and the rule of the Law of the Land! Thou* art *that* Nation being weighed in the balances and found wanting! *Repent and restore Justice in the land while the Hand of the Lord God of Israel is yet stayed in mercy!* O America, *Thou* art the Nation!

---

* Section 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes."

See, e.g., Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992) Nos. 91-155 and 91-339

May God, "the Supreme Judge of the world,"* Whom our Founding Fathers relied upon with a firm belief in "the protection of Divine Providence,"* Whom they declared endowed us with both life and certain "unalienable rights," have mercy upon this Court and upon this Land, so that the people may rejoice and truly Proclaim Liberty throughout the Land.

***The Unanimous Declaration of Independence** of the United States in Congress, July 4, 1776

Wherefore, Petitioner prays that this Court will reconsider its opinion re "Statutory Claims" against all Defendants;

And, that at the least this Court will order the district court to revoke its untimely, wrongly decided order dismissing this case with prejudice.

Respectfully submitted,

s/ Ralph P. Forbes

Ralph P. Forbes
In his own proper person,

Box 88
London, AR 72847
501/293-4641

APPENDIX Z-1: Affidavit of Facts re KHOG/KHBS private Commercial Licensee Defendants Attachment to Memorandum Brief Petition for Rehearing

In supplement to the allegations verified in the amended complaint I wish to amend and clarify my charges against the KHOG Defendants as follows:

The defendants are privileged licensees regulated by the FCC and appropriate statutes and regulations, including *42 USC 312* and *315* which require them to afford equal opportunities to all candidates, and forbids them to censor the candidate's expressions.

In regard to the particular censorship in this case, the footage which the defendants objected to in the Forbes' ad was *specifically and expressly approved for use in such ads by the FCC.*

Both the FCC and the Supreme Court have categorically forbade the defendants from censoring political ads:

"Similarly, we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as indecent so that they may restrict the time at which it airs even where it meets the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. **Such channeling would violate a federal candidate's reasonable access rights under Section 312 (a) (7) of the Act,** *which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities.* As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening ... They cannot be banned from entire day parts ... *Therefore, the practice of channelling material that is not indecent (i.e., the Forbes' ad) ... would deprive federal candidates of their rights to determine how best to conduct their campaigns.* See *CBS, Inc.*, 453 U.S. 367 (1981)

FCC 8210-AJZMJM of 21 August, 1992, pp 2,3.

Mr. Cunningham was aware of all this. The more laws I showed him the more hostile he became. He made it very

plain, the laws, the Constitution, the Supreme Court, the FCC, nothing made any difference: he was determined to censor my ads regardless of anything.

This censorship was deliberately timed so that irreparable harm would take place on the crucial Friday, Saturday and Sunday preceding the national elections; and so neither myself nor any other candidate with similar beliefs who was similarly censored could contact any authority, whether the FCC or the courts for redress until Monday morning, the day before the election. Even though the horse was long gone, the FCC would not be able to lock the barn door until long after the election. Thus, on Monday, the day preceding the election I amended the original pleadings to include the KHOG defendants. (47 C.F.R. § 73.1944(b) provides: *a licensee shall make its facilities available for use by federal candidates on the weekend before the election*; and *licensees shall not discriminate between candidates with regard to weekend access.*)

That afternoon while serving copies of the complaint upon management in Fayetteville, I offered to drop the suit against them if they would afford me equal time to express my views on the eve of the election. They laughed and repeated many times that "all's fair in love and war." They said everyone was "scared" I would be elected and that there was a general consensus amongst all "responsible" media in the area that my candidacy be "blacked out," and they boasted it would work to defeat me. They admitted that it was not "ignorance" of my candidacy that kept me out of the "debate" on their commercially staged "debate," but rather a calculated decision that I was "too dangerous" to allow the voters to hear me and my views. They admitted they really didn't know nor care what my views really are. They invited me to come to their post-election coverage, and said they would give me "lots" of coverage *after* the polls closed. I told them I neither liked nor desired publicity or notoriety, but that I saw it was a price to pay as my civic duty to bring to light ideas and concepts that are suppressed.

Subsequently, I have been informed that certain KHOG defendants attempted to persuade other broadcasters to join

them in suppressing my "last minute" ads.

Most Recent Case of Failure of the FCC "remedies"

This week I had occasion to speak with Michael Bailey, a former Republican candidate for congress in Indiana's 9th district. Bailey supplied me with the FCC approved footage in 1992. In 1992 Bailey's ads were not censored and he won the primary by 2:1 ratio. This year Bailey's ads were censored, and he lost. On or about April 5th Bailey appealed to the FCC for an emergency hearing so they would direct the stations to broadcast the Bailey ads containing the FCC approved footage. The election is now over, and Bailey still has not got a ruling from the FCC.

Once more, the FCC's touted "comprehensive enforcement mechanism for protection of a federal right," has miserably broken down and served merely as an obstruction of justice, a mechanism to deny justice by delaying justice, an evil deception designed to destroy those very rights it pretends to protect "under color of law."

Alas, no matter what the FCC decides, it cannot order a new election in which the electorate shall have their paramount rights to be fully informed enforced. The FCC cannot restore rights nor order restitution for irreparable damages and trespasses and violations of the most sacred rights. *Can the FCC award plaintiffs monetary damages? Can the FCC usurp the judicial powers delegated to the Courts by the Constitution?*

The uniform factual record is: *The FCC scheme is not an adequate remedy at law! Worse,* ***the FCC scheme has been perverted into a conspiracy to deprive the people of self government based on enlightened self interest under color of law.*** (*cf.* 126 a)

The FCC would not or could not protect the Constitution and the people's rights. Once again, after irreparable harm has been done to the most substantive, fundamental rights of the people, the FCC is perpetually powerless to restore, in the words of the 8th Circuit Order of December 22, 1992, "relief

with respect to it to have any meaning." The FCC has no remedy, *indeed the "cure" is invariably fatal.* It is clear, the sole remedy under law lies alone within the courts, not the administrative powers of the FCC.

I lodged complaints against the KHOG/KHBS defendants with the FCC immediately following their illegal censorship against me in November of 1992. The FCC has filed briefs against my position and in favor of the defendants as "amicus" in this matter; yet to this day I have heard nothing, after almost two years, re my very serious complaints against the KHOG and/or the AETN state defendants.

Further Affiant sayeth not.

s/ Ralph P. Forbes

Ralph P. Forbes
in propia persona,

Rt 3, Box 341
Russellville, AR 72801
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 25 Day of May, 1994.
My Commission expires June 30, 1996.
s/ Karen P. Forbes

Karen P. Forbes
Notary Public

APPENDIX Z-2: Affidavit of Facts re AETN State Defendants Attachment to Memorandum Brief Petition for Rehearing

Contrary to the State's surprise change of position from "From Forbes had no rights" to that I "sat on my rights" (Oral argument, August 31, 1993);

[1] I notified the AETN Defendants that I had overcome the State's unnecessarily burdensome requirements and was a qualified candidate for United States Congress for the 3rd district of Arkansas and requested my equal rights to present my views in the "debates" arranged, sponsored, set up, advertised and eventually broadcast by the State defendants. [2] The AETN State defendants denied my request to be afforded equal opportunities, so [3] I called the FCC in Washington DC to ask them to enforce the laws and protect my rights. The FCC representative was not sympathetic to my plight, advised me not to pursue the matter, told me the FCC procedure could not and would not give me an answer until long after the "debate" and the election were past; and in any case the FCC would deny me and uphold the AETN. When I asked if the FCC could expedite the matter by giving me its foregone conclusion so I could have something to appeal to the U.S. Courts he became very hostile and told me not to waste my time bucking the system.

[4] My repeated requests to the AETN state defendants and the FCC were all denied at all times until the present time. [5] On the eve of the debate the only redress and remedy at law known to me was a law suit together with a motion for expedited injunctive relief. [6] This motion was denied immediately without benefit of hearing by U.S. District Judge Franklin Waters.*

---

*The extreme hostility and prejudice by Judge Waters against plaintiff at all times, including dismissing this matter with prejudice while it was still in the jurisdiction and custody of this Court was a mystery until plaintiff discovered Judge Waters had had a fiduciary arrangement with one James B. Blair, *aka* Jim Blair, husband of one of the defendants in this matter, AETN Commissioner Diane Blair. Petitioner believes Mrs. Blair has subsequently been ap-

pointed by another defendant, William Jefferson Clinton, to the Board for the Corporation for Public Broadcasting, de facto one of the so-called "amici" pooling their resources with the defendants against the plaintiff.

Mr. James B. Blair is also a defendant in another case, *Forbes and the People v. Dr. Harry F. Ward*, presently before the Supreme Court of the State Arkansas, in which plaintiff in this matter is also the chief plaintiff.

At the very least Petitioner believes the cannon of judicial ethics would have required Judge Waters to recuse rather than eagerly dismissing the case with prejudice while it was in the jurisdiction of this honorable appellate Court.

---

[7] I immediately appealed for an Emergency single Judge Hearing. At the first single judge hearing in Judge Richard S. Arnold's chambers I offered to call the FCC and ask the same questions to see if the answers would be the same, but the AETN State Defendants vigorously objected.

The animosity of the AETN state defendants against plaintiff and his views has been expressed in many ways, including [A] Mr. Gene Goss publicly vowing to broadcast re-runs of "St. Elsewhere" in place of the debates of this honorable Court ordered him to include Forbes in the debate. [B] The hostility by Mr. Goss against not only Forbes but the UCA students who protested against censorship by the AETN State Defendants. [C] The desire to expend the resources of the State suppressing my views rather than grant me even second class "equality."

The Chandler (*Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 [11th Cir 1990]) case was somewhat mitigated by the fact that the PBS defendants offered "separate but equal" opportunities to the censored candidates whose views they were discriminating against. In this case, I was much more interested in expressing my views than fighting endless court battles against great odds, so [8] I offered to accept a separate and inherently, unequal opportunity to express my views to the people; but, [(9)] the hostility of the AETN defendants was so great they would rather expend state and court resources rather than allow even a

tiny portion of the electorate to hear even a few minutes of Forbes' uncensored free speech.

[(10)] Thereupon, I petitioned for additional emergency hearings before this Court and have been doing my best to vindicate my rights and the rights of the people so vilely violated by the AETN State Defendants ever since.

Further Affiant sayeth not.

s/ Ralph P. Forbes
Ralph P. Forbes
in propia persona,
Box 88
London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas/SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 25 Day of May, 1994.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

APPENDIX A-A

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WAFS

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, et al.,
APPELLEES,

PETITION TO RECALL MANDATE WITH EXPEDITED CONSIDERATION

COMES NOW, RALPH P. FORBES, APPELLANT in the above styled matter and respectfully petitions this Court to recall its mandate in the above styled matter for the following reasons:

1. Plaintiff believes he has good and sufficient cause to appeal that portion of the April 28, 1994, Order of this Court as to the commercial defendants;

2. Plaintiff has been seeking assistance of counsel to either represent his interests or as amicus. There is a wide interest in this case, all of which has produced a wide variety of interpretations as to how that portion of the Order pertaining to the commercial defendants is to be interpreted and what it means.

3. For example, Ms. Rita Spillenger of the ACLU, who has expressed interest in the AETN aspect of the case, believes the order as to the commercial defendants bears totally on the exhaustion of administrative procedures; and that your petitioner can proceed to vindicate his rights against the commercial de-

fendants once this process is "exhausted." If this reading and interpretation is correct, and depending upon further specification and clarification, an appeal may not be necessary.

JUSTICE DELAYED *IS JUSTICE DENIED*

It has been almost two years since I lodged a written complaint to the FCC re the commercial defendants' violation of the FCC rules, Title 47 U.S.C., et seq.; and even though the FCC has had time to appear on the defendants' behalf as amicus they have yet to respond to the prima facie violations by the defendants.

(Please see attachments.)

Therefore, Plaintiff requires answers to the following questions:

Q-1-A. Will the statute of limitations in this case expire while the FCC slowly slogs through its ponderous process?

Q-1-B. Or will the computation of time commence when the FCC finally decides to exhaust its administrative process?

Q-2. If the computation of time commences after the FCC's final decision, which has already squandered a congressional election cycle, much to the defendants' advantage and to the plaintiffs' irreparable hurt, what can compensate to obtain a fair and balanced trial if the FCC takes another year or two or three or ten or twenty or forever to respond and "exhaust" its procedures?

Q-3. If the FCC decides the commercial defendants violated the law, and because I and all Citizens and persons are entitled to a remedy at law, what redress or reparations can the FCC provide to me and to the voters for the injuries suffered by the defendants' actions?

Q-4. If the FCC decides the commercial defendants are constrained by the law and the clear language of their own regulations, and I am at last free to seek justice in the courts; then am I compelled to file an original action in the circuit court as

per the Hobbs Act, 28 U.S.C. 2342?

Q-5. If I must bypass the district court, am I then compelled to surrender my right to jury trial as guaranteed by the Bill of Rights?

4. Plaintiff respectfully reiterates part (*iv*) of his Petition for Rehearing:

"PLEASE TAKE NOTICE Petitioner in the above styled matter intends to appeal 'Part II, A. Statutory Claims' at 6 and 7 of the Order of April 28, 1994 if he is not successful in this Petition for Rehearing. Your Petitioner believes pursuant to the right to appeal and due process he requires a particular and sufficient *finding of fact and conclusion of law* from this honorable Court."

5. Plaintiff requires and believes he is entitled by law to [1] clarification of this honorable Court's Order as to the commercial defendants;

And [2] a finding of fact and conclusion of law as to that portion of the Order pertaining to the commercial defendants.

6. Rule 13 of the Supreme Court of the United States limits the time to petition for writ of certiorari to ninety [90] days from the date of denial of the petition for rehearing, in this case June 21st, 1994.

7. Plaintiff cannot properly begin to formulate his appeal without specificity of his status vis-a-vis the commercial defendants; and particulars of the grounds for this portion of the Court's decision. Therefore, plaintiff requires [1] a finding of fact and conclusion of law and [2] a clarification of the questions presented in this petition; just as I was at a loss to know the basis for the Court's opinion re certain "Statutory Claims" and was forced to play a game of legal "blind man's bluff" in my petition for rehearing re this same matter.

8. Thus, plaintiff is caught between the proverbial rock and the hard place; the clock is ticking but he is denied due process, being forced to appeal against what to him appears to be an ambiguous result resting on vague, inexplicit or nonexist-

ent underpinnings.

Wherefore, for all of the above reasons plaintiff/appellant respectfully requests that this honorable Court give expeditious consideration to this Petition and recall its mandate and provide your petitioner with its finding of fact and conclusion of law and clarifying answers to the foregoing questions of important questions of law and constitutional consequence.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person
Box 88
London, AR 72847
501/293-4641

CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I have sent a copy of the foregoing including the Memorandum Brief, List of Applicable Citations and Affidavits to Defendants and/or their counsel this 6th Day of July, 1994, at the following addresses:

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Jones, Gilbreath, Jackson & Moll For KHBS-TV, et al.
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Ms. Rita Spillenger
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Little Rock, AR 72201 (501)374-2660

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s/ Ralph P. Forbes

RALPH P. FORBES

APPENDIX B-B
The True Rule of Reason & Authoritative Case Law

... Because the statutory obligation of a Court of Appeals may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C.Cir. 1971); *see also Dean Foods*, 384 U.S. at 603, 86 S.Ct. at 1742 (quoting *McClellan v. Carland*, 217 U.S. 268, 280, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910)

(" '[W]e think it the true rule that where a case is within the appellate jurisdiction of a higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated...' ").29

29. *Cf. PEPCO (Potomac Electric Power Co. v. ICC)*, 702 F.2d at 1032-33 (premising appellate jurisdiction over claims of unreasonable agency delay on a slightly different rationale - postponement of an unreasonable delay claim until after the agency's decision may render it moot and deprive the Court of Appeals of the opportunity to review the delay claim, thus permitting present review under the All Writs Act). {Which is *precisely* what happened in Forbes' case} *e.g.*, (App. 17a).

TRAC, 750 F.2d 70 at 76 (App D.C., 1984)

[13] In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus. Although this court has decided several cases involving claims of of unreasonable delay, *see, e.g., PCHRG v. FDA*, 740 F.2d 21, (D.C.Cir. 1984); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983); *PEPCO*, 702 F.2d 1026 (D.C. Cir. 1983); *MCI Telecommunications Corp. v. FCC ("MCI")*, 627 F.2d 322 (D.C.Cir. 1980); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), we have not articulated a single test for when the writ should issue. On reading these cases together, however, one can discern the hexagonal contours of a standard. Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a "rule of reason," *PEPCO*, 702 F.2d at 1034; *MCI*, 627 F.2d at 340; (2) where Congress has

provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason, *PCHRG v. FDA*, 740 F.2d at 34-35; *PCHRG v. Auchter*, 702 F.2d at 1158, n. 30; *PEPCO*, 702 F.2d at 1034; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; *PCHRG v. FDA*, 740 F.2d at 34; *PCHRG v. Auchter*, 702 F.2d at 1157; *see also Blankenship v. Secretary of Health, Education and Welfare*, 587 F.2d 329, 334 (6th Cir. 1978); (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, *see, e.g., PCHRG v. FDA*, 740 F.2d at 34; *PCHRG v. Auchter*, 702 F.2d at 1158; (5) the court should also take into account the nature and extent of the interests prejudiced by delay, *PCHRG v. FDA*, 740 F.2d at 35; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *PCHRG v. FDA*, 740 F.2d at 34.

TRAC, 750 F.2d 70 at 79, 80 (App D.C., 1984)

Similarly, court has jurisdiction to hear and determine matter where company seeks relief from FTC action allegedly depriving it of its constitutional right to fair and impartial decision on the merits, notwithstanding assertion by FTC that court lacks jurisdiction over subject matter due to failure of company to exhaust administrative and judicial remedies provided ... *Lehigh Portland Cement Co. v. Federal Trade Com.*, (1969, CA4) 416 F.2d 971; Four-year delay by NLRB in issuing final order ... is unreasonable and must be taken into account when court fashions remedy. *Texas Petrochemicals Corp. v. NLRB*, (1991, CA5) 923 F.2d 398;

Plaintiff may proceed under 5 USC § 706 for court determination as to whether final decision has been unreasonably delayed because ... Act neither specifically provides for nor precludes actions to compel agency action unreasonably delayed. *Cal-Almond, Inc. v. Yeutter*, (1991, ED Cal) 756 F.Supp. 1351; *cf. La Bonne v. Heckler,* (1983, DC Minn) 574 F.Supp.... 1016, dismissed without opp. (CA8 Minn) 732 F.2d 161 and later proceeding (DC Minn) 580 F.Supp. 558; 47 USC § 414 does not preclude common-law action against telephone company. *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp. 729 (ED NY, 1984)

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act {The Urgent Deficiencies Act was incorporated in 47 U.S.C. § 402(a)} would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell v. United States, supra; cf. A.F. of L. v. Labor Board*, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347. The Powell case likewise repudiated the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. *See also Western Pacific C.R. Co. v. Southern Pac. Co.*, 248 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160; *Clairborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808.

CBS v. U.S., 316 U.S. 407, 419-420, 62 S.Ct. 1194, 1201, 86 L.Ed 1563 (1942)

CBS, id., is a case where allegations show a *threat* of irreparable injury to *a licensee's business*; this was *sufficient,* this Court said, to give standing for judicial review of FCC non-order, and "is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed ..." 316 U.S. 423, 62 S.Ct. 1203

* * *

Thus, it is futile to require a parent to pursue administrative remedies when state officials are not willing to hold a hearing. *Kerr Center Parents Assoc. v. Charles*, 897 F.2d 1463 (9th Cir. 1990). Nor is there any point to pursuing administrative remedies when the agency has *a priori* decided.

Zobrest v. Catalina Foothills School District, 963 F.2d 1190, 1193 n.2/reversed (9th Cir. 1992); ___ U.S. ___, 113 S.Ct. 52, 121 L.Ed.2d 21 (1993).

In *Shah v. Quinlin*, 901 F.2d 1241 (5th Cir. 1990), the 5th Circuit held that a pro-se prisoner should be permitted to amend his complaint to allege exhaustion of administrative remedies in light of the intransigence of prison officials. In this

case, even assuming that there is a requirement of exhaustion of administrative remedies, there is an important and signal fact question as to whether in the instant case such an application would be futile. The Circuit Court erred in not requiring the District Court to determine the truth of these allegations by the petitioner. Nor can there be any doubt, having found a cause of action, as to the ability of the courts to grant plenary relief as demanded by the circumstances.

* * *

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dept. of Chicago v. Mosley, 408 U.S. 92 at 96; 92 S.Ct. 2286 at 2290, 33 L.Ed.2d 212 (1972)

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden. Mr. Justice BRENNAN, STEWART, MARSHALL and POWELL joining in dissent in *Lehman v. City of Shaker Heights*, 94 S.Ct. 2714 at 2724, 418 U.S. 298 at 317, 41 L.Ed.2d 770 (1974)

"[A] function of free speech under our system of government is to invite dispute . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949)

A policy, however well meant, to give access to whatever is good for the community, unless in the judgment of the (defendants), it is injurious ..., is not in any legal or practical sense limited, but is selection, and if based on word content, censorship.[5] In fact some might think that excluding (petitioner Forbes' views) while permitting all else "would demonstrate not neutrality but hostility towards (petitioner Forbes' views)."

See Board of Education v. Mergens, __ U.S. __, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990).

[5] It is, of course, of no consequence that defendant does not discriminate on the basis of the particular ... viewpoint, but only on the subject. *Carey v. Brown*, 447 U.S. 455, 462 n.6, 100 S.Ct. 2286, 2291 n. 6, 65 L.Ed.2d 263 (1980).

Grace Bible Fellowship v. School Admin. Dist. 5, 941 F.2d 45 at 48 (1st Cir. 1991)

cf., Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141 (1993)

* * *

While newspapers are essentially different (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730), from the *necessarily* regulated broadcast media, nevertheless the Court has said:

... It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom... That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.* The First Amendment affords not the

slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity. {Italics supplied.}

Associated Press v. United States,
326 U.S. 1, 20, 65 S.Ct. 1416, 1424-1425

A free press is indispensable to the workings of our democratic society. The business of the press (much more so the privileged radio and television licensees who are granted the power to use portions of the public domain) ... is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts and potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." 52 F.Supp. 362, 372.

... The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. *A public interest so essential to the vitality of our democratic government may be defeated by* private *restraints no less than by public censorship.*

{Italics supplied.}

Associated Press v. United States,
326 U.S. 1, 28-29, 65 S.Ct. 1416, 1428

* * *

With respect to securities regulation, this Court has found that 15 USC §78n(a) authorizes a private right of action for one defrauded by a false security prospectus, even though the statutory law does not unequivocally grant such power. *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed2d 423 (1964). *Private enforcement* of the proxy rules *provides a necessary supplement to Commission action. Id.*, at 377 U.S. 432, 84 S.Ct. 1560; We, therefore, believe that under the circumstances here, *it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. Id.*, 377 U.S. 433, 84 S.Ct. 1560

Similarly, in *Superintendent of Insurance of The State of New York v. Bankers Life & Casualty*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed2d 128, (1971), the Court held §17(a) of the Securities Act of 1933, 48 Stat. 84, 15 USC §77q(a) and §10 of the Securities Act of 1934, 48 Stat. 891, 15 USC §78j(b) to confer on a corporation cause of action for fraud or deceit in the sale of securities, though it was their own insiders who perpetrated it, and *though the Acts, on their face, do not address the subject.*

Again, in *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed2d 1189 (1968) *the Court recognized a cause of action under 42 USC §1982* to a prospective home buyer for injunctive relief against a racially discriminatory seller.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed2d 386 (1969) *monetary damages were available against a private corporation* which refused to recognize a transfer of membership rights in a neighborhood corporation providing recreational benefits because of the assignee's race: We hold in *Jones v. Alfred H. Mayer Co.* that *although §1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an equitable remedy. Id.*, 396 U.S. at 238, 90 S.Ct 405

Thus, 42 USC §1983, likewise, provides and confers a private cause of action.

In *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct 817, 22 L.Ed2d 1 (1969) *private citizens were allowed to sue under the Voting Rights Act*, 79 Stat. 437, 42 USC §1973, *et seq.*

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney

General. For example, the provisions of the Act extend to States - *and the subdivisions thereof.* {Emphasis in original} The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. *It is consistent with the broad purpose of the Act to allow the individual citizen standing* to insure that his city or county government complies with the §5 approval requirements. *We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action.*

Allen, Id., 393 U.S. at 556, 557; 89 S.Ct at 827 citing *J.I. Case Co. v. Borak.*

Petitioner would argue that *Cort v. Ash*, 422 U.S. 66, 95 S.Ct 2080; 45 L.Ed2d 26 (1975) (no private right of action under federal law) and *Touche Ross & Co. v. Redington*, 442 U.S. 550, 99 S.Ct 2479, 61 L.Ed2d 82 (1979) (no private right of action under disclosure requirements of securities law) are not in point and are not controlling because they do not confer specific rights upon identifiable parties as does §315(a).

* * *

Any person whose right to vote was impaired by conduct of defendants had standing to sue. *Gray v. Sanders*, 83 S.Ct. 801

Prisoner was not required to pursue futile administrative remedies with respect to §1983. *Goar v. Civilletti*, 688 F.2d 27 (6th Cir 1982);

In *Doty v. Carey*, 626 F.Supp. 359 (N.D. Ill. 1936) parents were not limited to wrongful death statute when police shot their sleeping son in his own bed. Citing *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed2d 59 (1984) the court agreed that a motion to dismiss may be granted only when relief would not be available under any set of facts consistent with the allegations; and for purposes of such a motion the court must accept all such allegations as true, at 360.

When alternative remedy is insufficient or inconsistent with the meaning and purpose of §1983 ***the court must fashion a remedy from common law.*** See *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1183 (7th Cir.

1985); Bell, 746 F.2d at 1234. Id. at 362; *cf., Wong Yang Sung v. McGrath*, 70 S.Ct. 445, 339 U.S. 33; *Bivens, supra.*

42 USC § 1983 provides private remedial cause of action if there is state deprivation of right secured by federal statute, unless state actor demonstrated express provision or other specific evidence from statute itself that Congress intended to foreclose such private enforcement; When tenants complained that respondents were circumventing the Brooks Amendment to the Housing Act of 1937 by over-billing them for utilities the case was dismissed by the district court. Dismissal was affirmed by the circuit court; but this Court reversed and declared:

We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of federally secured right. {Italics supplied}

Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 at 422, 107 S.Ct. 766 at 770 93 L.Ed.2d 781, (1987) Citing *Smith v. Robinson*, 468 U.S. 992 at 1012, 104 S.Ct. 3457 at 3468, 82 L.Ed.2d 746 (1984).

Thus, §1983 claims are inherently different from statutory claims: As courts have recognized, however, statutory section 1983 claims differ significantly from implied private rights of action. *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985)

Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed2d 555 (1980) held that §1983 was available to enforce violations of federal statutes by agents of the state.

Title VII is not exclusive remedy for employment discrimination and action may be brought under §§ 1983 and 1985. Both Fourteenth Amendment and Title VII grant public sector employees right to be free of employment discrimination; plaintiff may sue her state government employer for violations of Fourteenth Amendment through § 1983 and escape Title VII's comprehensive remedial scheme ...

Ratcliff v. Milwaukee, (1986, CA 7 Wis) 795 F.2d 612

Title VII (42 USC §§ 2000e et seq.) does not preempt action under 42 USC § 1983 for violation of Fourteenth Amendment.

Roberts v. College of Desert, (1988, CA9 Cal) 861 F.2d 1163

Terminated employee's 42 USC § 1983 action was not preempted by (comprehensive remedial scheme) where defendant's conduct allegedly violated (specific federal law) and separate

constitutional rights of of employee, where employee's speech ... was protected under First Amendment.

Johnston v. Harris County Flood Control District, (1989, CA5) 869 F.2d 1565

Court's erroneous findings Title VII (42 USC §§ 2000e et seq.) action did not preclude subsequent jury trial on 42 USC § 1983 claims on basis of collateral estoppel.

Farber v. Massillon Bd. of Educ., (1990, CA6 Ohio) 908 F.2d 65; *Brown v. Hartshorne Public School Dist.*, (1988, CA10 Okla) 864 F.2d 680; *Walters v. Western State Hospital*, (1988, CA10 Okla) 864 F.2d 695

Medicaid Act (42 USC § 1396a(a)(13)(A)) created right in action under 42 USC § 1983. *Wilder v. Virginia Hosp. Assn.*, (1990, US) 110 L.Ed.2d 455, 110 S.Ct. 2510; *Virginia Hospital Asso. v. Baliles*, (1989, CA4 Va) 868 F.2d 653

National Guard Technicians Act did not preempt relief under § 1983, inasmuch as Congress did not intend such result.

Johnson v. Orr, (1986, CA3 NJ) 780 F.2d 386; *cf.*, Wong Yang Sung v. McGrath, 70 S.Ct. 445, 339 U.S. 33

Availability of injunctive remedy under 42 USC § 2000a does not preclude recovery of monetary damages under 42 USC 1985(3). *Fisher v. Shamburg*, (1980, CA10 Kan) 624 F.2d 156

Exhaustion of administrative and state court remedies is not prerequisite for jurisdiction. *Hazard v. Weinberger*, (1974 S-D NY) 382 F.Supp. 225, affd without op (CA2 NY) 519 F.2d 1397

42 USC § 1983 provides express private right of action to enforce 23 USC § 301, proscribing tolls on federally funded bridges. *Clallam County v. Department of Transp.*, (1988, CA9 Wash) 849 F.2d 424; *See, e.g., West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed2d 40 (1988) in which a private contract physician for prisoners is subject to §1983.

Foster parents had private cause of action under 42 USC § 1983 to enforce rights under Social Security Act (42 USC §§ 620-628 and §§ 670-676).

Timmy S. v. Stumbo, (1990 CA6 Ky) 916 F.2d 312.

See also: *Artist M. v. Johnson* (1990 CA7 Ill) 917 F.2d 980; *Pelfresne v. Williams Bay*, (1990, CA7 Wis) 917 F.2d 1017; *Carelli v. Howser*, (1991, CA6 Ohio) 923 F.2d 1208; *Planned Parenthood of Billings, Inc. v. Montana*, (1986, DC Mont) 648 F.Supp. 47; *Dodds v. Simpson*, (1987, DC Or) 676 F.Supp. 1045; *Willis v. Bell*, (1988, ND Ill) 687 F.Supp. 380; *Rothschild v. Grottenthaler*, (1989, SD NY) 716 F.Supp. 796

* * *

National Broadcasting Co. v. United States (NBC), 319 U.S. 190, 63 S.Ct. 997 (1943) was a narrowly decided case extending FCC authority beyond its primary jurisdiction of engineering and technical aspects to include regulation of contracts between *licensees and networks* but *not* setting a standard so indefinite as to confer unlimited power. Mr. Justice MURPHY, joined by Mr. Justice ROBERTS, dissenting said:

"I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But *we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted.* Since that is what the Court in substance does today, I dissent.

"In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion has assumed a position of commanding importance, rivaling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be destroyed. But *because of its vast potentialities as a medium of propaganda, the character and extent of control that should be exercised over it by gov-*

ernment is a matter of deep and vital concern. Events in Europe show that radio may be readily a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, *to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.*" {Italics supplied.}

NBC, 319 U.S. at 227-228, 63 S.Ct. 1014-1015

If this reasoning bears any weight in the matter of contracts, how much more cogent is its admonition against bestowing powers of censorship to *anyone*, state or *private* actors, to control what the people are permitted and forbidden to hear when deciding on matters of "informed" self-governance.

... We noted that the Act permits the Commission to promulgate "such rules and regulations, ... *not inconsistent with law* ..."

FCC v. WNCN Listeners Guild, 101 S.Ct. 1266 at 1274, 450 U.S. 582 at 594, 67 L.Ed2d 521 (1981) *cf.*, 47 USC § 303(r)

* * *

The frequent repetition of a wrong will not make it right.

Amos v. Mosley, 74 Fla 555, 77 So. 619;
Kingsley v. Merril, 122 Wis. 185, 9 NW 1044

During the 1994 election cycle, a significant number of candidates or their counsels or supporters contacted petitioner re the 8th Circuit's very narrow, limited question of state censorship. Certainly not all such candidates heard of petitioner's case (or read between the distorted, sensationalist headlines); (b) nor is it likely that all of that limited class succeeded in contacting petitioner. Thus, this case is representative of a continuing invidious invasion against the rights of a free people, entrenching itself by custom, precedent and bureaucratic "catch 22" hazards; repetitive, yet evading review.

This is "a classic justification for a conclusion on nonmoot-

ness." It is "capable of repetition, yet evading review." This case is a justiciable controversy because "[t]he 'logical nexus between the status asserted and the claim sought to be adjudicated,' *Flast v. Cohen*, 392 U.S. at 102, 88 S.Ct. at 1953, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969, are both present."

Roe v. Wade, 410 U.S. 113 at 712, 93 S.Ct. 705 at 125 *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d (1969); *Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 1282, n.8, 39 L.Ed.2d 714 (1974); *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 704, 705, 116 L.Ed.2d 711 (1992)

Thus, the issue of the continued viability of the fairness doctrine with regard to ballot issues would never be resolved if we found this case to be moot.

Arkansas AFL-CIO v. FCC, 11 F.3d 1430 at 1436 (8th Cir. 1993)
Libertarian Party v. Bond, 764 F.2d 538, 539 n. 1 (8th Cir. 1985)

* * *

"What is the Constitution? It is no vague, indefinite, floating unsubstantial something. ... It is something substantial. It is a plainly written document, not in Hebrew nor in Greek, but in English, beginning with a preamble, fitted out with articles, sections, provisions, and clauses, defining the rights, powers, and duties to be secured, claimed, and exercised under its authority. ... It is a thing in itself; complete in itself; has a character of its own. ... It is a great national enactment."

Frederick Douglass, *The American Constitution and the Slave*, Glasgow, Scotland, March 26, 1860

His watchmen are blind: they are all ignorant, they are all dumb dogs, they cannot bark; sleeping, lying down, loving to slumber. Yea, greedy dogs which can never have enough, and they [are] shepherds [that] cannot understand: they all look to their own way, every one for his gain, from his quarter.

Isaiah 56:10,11 (KJV)

If even the Almighty's watchmen can fail to do their duty, then surely the Court must be ever wary of institutions and schemes that miscarry in their constitutional duties and limitations.

These practices contain numerous obstacles, which separately, and together, including those *restrictions based on time and procedural obstacles* create an "equal-access"-sabotaging-scheme which "in its totality" "operates to freeze the status quo" and effectively preclude non-anointed, independent and third party candidates and their viewpoints, which the eighth circuit found unconstitutional when used to "impose requirements or restrictions *based on time* ... which effectively prevented a third party ... candidate from ever [being heard]."

MacBride v. Exon, 558 F.2d 443 at 449 (8th Circuit, 1977)

Acts of defendants and the totality of the circumstances, the procedure and practice imposed and applied which has resulted in the denial and abridgement the right to vote, which give not only less opportunities than other members of the electorate to participate in the electoral process and elect representatives of their choice, but zero opportunities, qualifies petitioner and the thousands of qualified electors who petitioned for ballot access the status of a protected class under 42 USC 1973.

And this honorable high Court declared: A conspiracy against the right to run is as invidious as conspiracy against the right to vote.

U.S. v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed 1368 (1941)

The FCC's vitiated interpretations virtually preclude an excluded candidate from ever qualifying for equal access to express suppressed views, therefore they place "substantially unequal burdens on both the right to vote and the right to associate."

Williams v. Rhodes, 393 U.S. 23 at 31;
89 S.Ct. 5 at 10; 21 L.Ed.2d 24 (1968)

* * *

Let us contemplate our forefathers, and posterity, and resolve to maintain the rights bequeathed to us from the former, for the sake of the latter. The necessity of the times, more than ever, calls for our utmost circumspection, deliberation, fortitude and perseverance. Let us remember that *"if we suffer tamely a lawless attack upon our liberty, we encourage it, and involve others in our doom." It is a very serious consideration ... that millions yet unborn may be the miserable sharers of the event.*

Samuel Adams, *Speech* [1771]
Father of The American Revolution